No. 5705

United States

Circuit Court of Appeals

For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

J. H. HANSON and JENNIE B. HANSON,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorneys for Appellant:
BUTLER, VAN DYKE & DESMOND, Esqs.,
EDWARD P. KELLY, Esq.,
Sacramento, Calif.

Attorneys for Appellees:
RALPH H. LEWIS, Esq.,
GEORGE E. McCUTCHEN, Esq.,
Sacramento, Calif.

In the Northern Division of the District Court of the United States, in and for the Northern District of California.

J. H. HANSON and JENNIE B. HANSON,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

COMPLAINT.

Plaintiffs complaining allege:

I.

That defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That plaintiffs are citizens and residents of the State of California; that defendant is a resident of the State of Minnesota and the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

That on and prior to the first day of November, 1921, plaintiffs were residing in Minneapolis, Minnesota, were wholly unfamiliar with California farm and fruit lands, the nature, quality and values thereof and in all the negotiations hereinafter referred to were compelled to rely, and did rely, entirely upon the statements and representations of defendant with respect thereto.

IV.

That defendant well knew of the unfamiliarity of plaintiffs with each of the matters and things contained in the representations hereinafter set forth and with intent to cheat [1*] and defraud plaintiffs by inducing them to enter into the contract hereinafter referred to falsely and fraudulently stated and represented to plaintiffs that all of the 10-acre tracts of land in the County of Sacramento, State of California, then being sold by defendant were, and particularly that that certain real property in the County of Sacramento, State of California, described as Lot No. 22 of Rio Linda Subdivision No. 5 as per the official map or plat thereof on file and of record in the Office of the Recorder

*Page-number appearing at the foot of page of original certified Transcript of Record.

of the County of Sacramento, State of California, was of the fair and reasonable value of $275.00 per acre; that all of the land thereof was rich and fertile and was capable of producing all sorts of farm crops and products; that said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that said land was perfectly adapted to the raising of fruits of all kinds in commercial quantities; that said land was capable of producing large crops of any kind of deciduous fruit planted thereon; and that said crops were of the finest quality.

V.

That plaintiffs relied solely upon said representations, and each of them, and believed the same to be true and solely by reason thereof entered into a contract with defendant on or about said first day of November, 1921, whereby defendant agreed to sell and plaintiffs agreed to purchase the 10-acre tract of land above described at a price of $2,750.00.

VI.

That plaintiffs paid $550.00 down at or about the time of the execution of said contract and well and faithfully did and performed all the terms, covenants and conditions thereof [2] on their part to be performed. That on or about the first day of February, 1925, defendant conveyed said lands to plaintiffs and in payment of the balance of the purchase price thereof plaintiffs executed and delivered to defendant two promissory notes and secured the same by deeds of trust upon said real property. That the first of said deeds of

trust was to J. W. S. Butler, and B. F. Van Dyke, trustees of the F. A. Bean Foundation, Inc., a corporation, and secured a note for $1,000.00, payable to said F. A. Bean Foundation, Inc., a corporation. That the second of said deeds of trust was to said J. W. S. Butler and B. F. Van Dyke, trustees of defendant, and secured a note made payable to defendant in the sum of $1,200.00. That plaintiffs have paid all of the interest but none of the principal upon the note secured by said first deed of trust and have paid $800.00 and all of the interest upon the note secured by said second deed of trust.

VII.

That it was not then, there, at any time, or at all true that said land above described, or any of said parcels of land, were, or was, of the value of $275.00 per acre, or that any portion thereof was worth in excess of $50.00 per acre and/or that any of said land was fertile and/or that said land would produce any crops in commercial quantities and/or was at all adapted to the growing of fruits or fruit-trees and/or that trees of any kind would grow, thrive or flourish thereon.

VIII.

That said representations were, and each of them was, at the time of the making thereof false and untrue and were at said times known to defendant to be false and untrue and were made solely for the purpose of cheating plaintiffs out of their money by inducing them to enter into said contract and to make said [3] payments.

IX.

That plaintiffs did not discover the falsity of said representations, or any of them, until about the month of February, 1928, and prior thereto and because of their reliance thereon plaintiffs expended moneys in the improvement of said described real property and bestowed labor thereon. That in so doing plaintiffs constructed a house thereon at an expense of $1500.00, a garage at an expense of $100.00, a lean-to barn at an expense of $25.00, chicken-houses at an expense of $950.00, three brooder-houses at an expense of $420.00; dug a well and pump pit at an expense of $265.00; put up a tank-house at an expense of $100.00; installed a windmill and pump at an expense of $75.00, a water-tank at an expense of $85.00, an electric pump at an expense of $175.00, a concrete tank at an expense of $50.00, water-pipes at an expense of $150.00. That plaintiff also levelled said land for cultivation at an expense of $150.00 and fenced the same at an expense of $50.00. That each of said sums was the actual, necessary and reasonable expense of each of said items.

X.

That in making said improvements plaintiffs have expended upon said property a total sum in excess of $4,095.00 and have paid and agreed to pay for said land $2,750.00, making a total of $6,845.00. That had said property been as represented said moneys would have been properly expended thereon and said property would have been worth, with said improvements, at least $7,000.00

but by reason of the fraud and deceit of defendant, as aforesaid, and by reason of the falsity of said representations said land, as improved, is not worth in excess of $1500.00, and plaintiffs have thereby been damaged in the sum of $5,345.00. [4]

XI.

That said acts of defendant, and each of them, and defendant's whole course of conduct was unlawful, malicious, fraudulent and oppressive and a reasonable sum to be allowed plaintiffs as punitive damages therefor is $5,000.00.

WHEREFORE, plaintiffs pray judgment for $10,345.00, for plaintiffs' costs of suit and for such other and further relief as to the Court shall seem meet and proper.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

State of California,
County of Sacramento,—ss.

J. H. Hanson, being first duly sworn on oath, says he is one of the plaintiffs in the above-entitled action and that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters stated on information and belief and as to those matters he believes it to be true.

J. H. HANSON.

Subscribed and sworn to before me, this 28th day of February, 1928.

[Seal] GEORGE E. McCUTCHEN,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Feb. 29, 1928. [5]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes defendant above named and demurs to the complaint of plaintiffs on file herein, and for grounds of demurrer alleges as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this, that it cannot be ascertained therefrom why plaintiffs were compelled to rely upon the statements and representations of the defendant with respect to the property referred to in plaintiffs' complaint.

III.

That said complaint is further uncertain in this, that it does not appear therefrom what facts were discovered by plaintiffs in or about the month of February, 1928, or thereafter, from the discovery of which plaintiffs allege that they became informed of the alleged falsity of said representations; nor can it be ascertained therefrom what was the nature

or character of the work and/or labor bestowed upon said property as alleged in plaintiffs' complaint; nor can it be ascertained therefrom the quantity of labor so bestowed. [6]

IV.

That said complaint is further uncertain in this, that it cannot be ascertained therefrom whether or not plaintiffs, prior to entering into said contract, knew or were informed that the lands alleged to have been purchased from defendant were underlain with hard-pan and clay.

V.

That said complaint is further uncertain in this, that it cannot be ascertained therefrom what quantities of fruit are "commercial quantities," or what is meant by the terms "commercial quantities" as used in plaintiffs' complaint, or what is meant by the term "merchantable fruits" as used therein, or in what way, or in what particulars said lands purchased by plaintiffs were not similar to the other land alleged to have been shown to plaintiffs.

VI.

That said complaint is further uncertain in this, that it cannot be ascertained therefrom what is meant by the terms "rich and fertile" as used in plaintiffs' complaint with relation to the quality of the soil alleged to have been purchased by plaintiffs, or what is meant by the terms "conditions and things injurious or harmful to the growth of fruit-trees," or what defects in said soil rendered it unadapted to the growing of fruits or fruit-trees, or

why said soil was not adapted to the growing of fruit-trees or adapted to the growing of farm crops or products.

VII.

That said complaint is ambiguous and unintelligible for each of the reasons hereinabove given for its being uncertain.

VIII.

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof, of the [7] Code of Civil Procedure of the State of California.

WHEREFORE, defendant prays that plaintiffs take nothing by their action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 13th day of March, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Pltfs.

[Endorsed]: Filed Mar. 13, 1928. [8]

In the Northern Division of the District Court of the United States, in and for the Northern District of California.

No. 475.

J. H. HANSON and JENNIE B. HANSON,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

AMENDMENT TO COMPLAINT.

Come now the plaintiffs above named and pursuant to the annexed stipulation file this, their amendment to the complaint herein, and allege:

XII.

That after signing said contract plaintiffs continued to reside in Minnesota until October 4, 1922, and did not arrive in California until about October 25, 1922. That plaintiffs moved upon said property about November 11, 1922, and have resided thereon ever since.

XIII.

That all the lands adjoining the lands so sold by defendant to plaintiff were sold to persons formerly residing in the eastern part of the United States and unfamiliar with California lands as fruit lands of great value, and it was believed generally in the locality of said lands up to February, 1927, that

said lands were fruit lands and of the value of $350.00 per acre and upwards.

XIV.

That plaintiffs did not plant any trees until the spring of 1925, and at said time planted about thirty thereof. That said trees appeared to do well during the balance of the year 1925 but about six thereof died in the year 1926. That at the time of the death of said trees plaintiffs made inquiry concerning the same and were advised that some fruit-trees die in any [9] soil and, therefore, did not discover therefrom that said land was not well adapted to the raising of fruit. That about six more of said trees died in the year 1927, but for the same reason plaintiffs did not discover therefrom that said land was not fruit land.

XV.

That about the first day of February, 1925, defendant solicited plaintiffs to take a deed to said property and pay the balance upon said contract by executing notes therefor and securing the same by deeds of trust upon said property. That defendant conducted the whole of said negotiations, arranged the placing of said loans and all that plaintiffs did in connection therewith was to sign the necessary papers at the instance of defendant. That plaintiffs did not have any other occasion to attempt to borrow any money on said property and never discussed said property or its value with any real estate broker, salesman, banker, or either thereof, except as follows: That in the summer of 1926, plaintiffs had occasion to borrow $150.00 and

in the summer of 1927 to borrow $100.00 upon unsecured notes from the California Trust & Savings Bank. That on each of said occasions plaintiffs were asked to make a statement of their assets and did so, including therein said lands at $275.00 per acre. That said lands were not appraised and said bank did not take any exception to the valuation so placed thereon.

XVI.

That in the spring of 1927 a number of the persons who had bought adjoining lands complained that they had been defrauded and made complaints to the District Attorney of the county of Sacramento and also to the Real Estate Commissioner of the State of California. That said District Attorney conducted some sort of investigation and did not take any action concerning said matter, and said Real Estate Commissioner dismissed [10] said complaints for lack of jurisdiction. That plaintiffs only heard thereof casually and were not among said complainants and believed from the dismissal of said charges and the refusal to act thereon that said complaints were groundless and without merit.

XVII.

That plaintiffs heard nothing further thereof until they learned in the middle of the year 1927 that a number of said persons had filed suits against defendant to recover damages for deceit in the sale of such adjoining lands. That because of the previous investigation of said matter plaintiffs did not believe said suits to be well founded until they heard in the month of January, 1928, of the de-

cision in this court in the case of Charles J. Elm and Claire V. Elm vs. Sacramento Suburban Fruit Lands Company, the defendant in this case, and in the month of February, 1928, of the decision of the case of John E. Wellnitz vs. defendant in the Superior Court of the State of California in and for the County of Sacramento. That as a result thereof plaintiffs considered their land further and the fact that said trees had died and that their soil was similar to the soil on the Elm and Wellnitz places and as a result thereof discovered about February, 1928, that they had been defrauded as hereinbefore set forth.

WHEREFORE, plaintiffs pray judgment for $10,345.00, for plaintiffs' costs of suit and for such other and further relief as to the Court shall seem meet and proper.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs. [11]

State of California,
County of Sacramento,—ss.

J. H. Hanson, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action and that he has read the foregoing amendment to complaint and knows the contents thereof, and that the same is true of his knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. H. HANSON.

Subscribed and sworn to before me this 8th day of May, 1928.

[Seal] GEORGE E. McCUTCHEN,
Notary Public in and for the County of Sacramento, State of California.

It is hereby stipulated that the foregoing amendment to complaint may be filed in the above-entitled matter.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed May 14, 1928. [12]

[Title of Court and Cause.]

DEMURRER TO AMENDED COMPLAINT.

Comes now defendant above named and demurs to plaintiffs' complaint as amended, and for grounds of demurrer thereto, alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint, and said cause of action therein set forth, are and each of them is, barred by Section 338 of the Code of Civil Procedure of the State of California, and by Subdivision 4 of said Section.

WHEREFORE, defendant prays that plaintiffs take nothing by their action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 21 day of May, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 21, 1928. [13]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 11th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 11, 1928—ORDER OVERRULING DEMURRER.

The demurrer to complaint and the demurrer to the amended complaint came on regularly this day for hearing, and after argument by the counsel for the respective parties, IT IS ORDERED

that the demurrers be and the same are hereby overruled, with 20 days to answer. [14]

[Title of Court and Cause.]

ANSWER.

Now comes the defendant, and answering the complaint of plaintiffs on file herein, admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in Paragraphs I and II of plaintiff's complaint.

II.

Admits that on or prior to the month of November, 1921, plaintiffs were residing in Minneapolis, Minnesota.

Concerning the allegations in Paragraph III of plaintiffs' complaint to the effect that prior to the month of November, 1921, plaintiffs were wholly unfamiliar with California lands, their qualities, characteristics and values, and particularly with California fruit lands, defendant alleges that it has not sufficient information or belief upon or concerning said allegations to answer the same, and therefore and upon that ground it denies, both generally and specifically, each and all of said allegations.

III.

Admits that plaintiffs entered into a contract with defendant on or about November 1st, 1921,

whereby defendant agreed [15] to sell and plaintiffs to buy the real property described in Paragraph IV of plaintiffs' complaint, at the price of Two Thousand Seven Hundred Fifty ($2,750.00) Dollars.

IV.

Admits that plaintiffs paid $550.00 down at or about the time of the execution of said contract; admits that on or about February 1st, 1925, defendant conveyed said lands to plaintiffs and that plaintiffs executed at the time of said conveyance, the two deeds of trust referred to in Paragraph VI of plaintiffs' complaint; admits that the second lien deed of trust therein described secured a note made payable to defendant in the sum of $1,200.00, which note was at said time delivered to defendant, and that the first lien deed of trust described therein secured a note for $1,000.00 payable to F. A. Bean Foundation, Inc.; denies that said note made payable to F. A. Bean Foundation, Inc., was executed or delivered to defendant, but alleges that the same was executed and delivered to F. A. Bean Foundation, Inc.; admits that plaintiffs have paid the interest upon the note secured by the first deed of trust up to February 2d, 1928, and have paid none of the principal thereof, and that plaintiffs have paid all of the interest upon the note secured by said second deed of trust up to February 2d, 1928, and $725.00 upon the principal thereof, but denies that other or further payments have been made.

V.

Admits that plaintiffs constructed upon said

property a house, garage, lean-to barn, chicken-houses, brooder-houses, tank-house, windmill and pump, water-tank, electric pump and concrete tank, well and pump pit, water-pipes, and fencing.

Concerning the allegations in Paragraph IX of plaintiffs' complaint to the effect that plaintiffs constructed upon said premises [16] a house at an expense of $1,500.00, a garage at an expense of $100.00, a lean-to barn at an expense of $25.00, chicken-houses at an expense of $950.00, three brooder-houses at an expense of $420.00, dug a well and pump pit at an expense of $265.00, put up a tank-house at an expense of $100.00, installed a windmill and pump at an expense of $75.00, a water-tank at an expense of $85.00, an electric pump at an expense of $175.00, a concrete tank at an expense of $50.00, water-pipes at an expense of $150.00, and that plaintiff leveled said land for cultivation at an expense of $150.00 and fenced the same at an expense of $50.00, and that each of said sums was the actual, necessary and reasonable expense of each of said items, defendant alleges that it has not sufficient information or belief upon or concerning said allegations to answer the same, and therefore and upon that ground it denies, both generally and specifically, each and all of said allegations.

VI.

Concerning the allegations of Paragraph X of plaintiffs' complaint to the effect that in making improvements upon said property plaintiffs have expended a total sum in excess of $4,095.00, de-

fendant alleges that it has not sufficient information or belief concerning the same to enable it to answer, and for that reason and upon that ground, it denies, both generally and specifically, each and all of said allegations.

VII.

Defendant denies each and all of the allegations of plaintiffs' complaint not herinabove denied for want of information and belief, or not hereinabove expressly denied or expressly admitted.

Further answering plaintiffs' complaint, defendant alleges:

That after the execution of said contract between the plaintiffs and the defendant, and after plaintiffs had knowledge of [17] the actual condition, quality and value of said land, and its adaptability for horticultural and agricultural uses, plaintiffs became, and were, frequently in default under the terms and conditions of said contract and under the terms and conditions of said promissory note secured by the second lien deed of trust referred to in plaintiffs' complaint, and on numerous and diverse occasions, when so in default, plaintiffs applied to and received from defendant, extensions of time to make such payments so in default and requested and obtained waivers of such defaults from defendant; that at no time did plaintiffs inform defendant that they claimed to have been, or were, defrauded or deceived in the purchase of said property.

As a further defense to plaintiffs' action herein defendant alleges:

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof of the Code of Civil Procedure of the State of California.

Answering the amendment to plaintiffs' complaint on file herein, defendant admits, denies and alleges as follows, to wit:

I.

Admits the allegations of Paragraph XII of said amendment to plaintiffs' complaint.

II.

Concerning the allegations of Paragraph XIV of said amendment, defendant alleges that it has not sufficient information or belief to enable it to answer the same and for that reason and upon that ground, denies, both generally and specifically, each and all of said allegations in said amendment to plaintiffs' complaint contained. [18]

III.

Concerning the allegations in Paragraph XV of said amendment to the effect that plaintiffs did not have occasion to attempt to borrow money on said property and never discussed said property or its value with any real estate broker, salesman, banker, or either thereof, except that in the summer of 1926 plaintiffs had occasion to borrow $150.00 and $100.00 upon unsecured notes, from the California Trust and Savings Bank; that on said occasion plaintiffs made statements of their assets, including

said lands at $275 per acre, and that said lands were not appraised and said Bank did not take any exception to the values so placed thereon, defendant alleges that it has not sufficient information or belief to enable it to answer the same, and upon that ground, and for that reason, it denies, both generally and specifically, each and all of said allegations.

IV.

Admits that in the spring of 1927 a number of persons who had bought lands in the Rio Linda District complained that they had been defrauded and made complaint to the District Attorney of the County of Sacramento, and to the Real Estate Commissioner of the State of California; defendant alleges that said District Attorney conducted an investigation of said complaint and did not take action concerning the matter for the reason that from such investigation said official determined that the facts did not warrant any action being taken; admits that said real estate commissioner dismissed said complaints for lack of jurisdiction.

V.

Concerning the allegations of Paragraph XVII of said amendment, defendant alleges that it has not sufficient information or [19] belief to enable it to answer the same, and for that reason and upon that ground, denies, both generally and specifically, each and all of the said allegations.

VI.

Defendant denies each and all of the allegations contained in the said amendment to plaintiffs' complaint not hereinabove denied for want of informa-

tion or belief, or not hereinabove expressly admitted or expressly denied.

WHEREFORE, defendant prays that plaintiffs take nothing by their said action herein, and that defendant have and recover of and from plaintiffs its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

State of California,
County of Sacramento,—ss.

L. B. Schei, being duly sworn, deposes and says:

That he is an officer, to wit, the resident secretary of Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the within-entitled action; that he makes this affidavit for and on behalf of said corporation defendant; that he has read the foregoing and annexed answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to such matters he believes it to be true.

L. B. SCHEI.

Subscribed and sworn to before me, this 27 day of August, 1928.

[Seal] J. W. S. BUTLER,
Notary Public in and for the County of Sacramento, State of California. [20]

Service hereof is hereby admitted and receipt of copy acknowledged this 28 day of August, 1928.

RALPH H. LEWIS,
Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 29, 1928. [21]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Wednesday, the 17th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 17, 1928—TRIAL.

This case came on regularly this day for trial. Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiffs and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant. Thereupon the following named persons, viz.:

J. F. Cogan,	Harry S. Anderson,
C. Hair,	James S. Rogers,
A. G. George,	Jack Madden,
F. A. Mautz,	Gustav Warg,
Marshal C. Curtis,	Fred McLeod, and
Geo. H. Richards,	Geo. E. Mack,

twelve good and lawful jurors, were, after being duly examined upon their oaths, sworn to try the issues joined herein. Counsel for both sides made their opening statements to the Court and jury.

J. H. Hanson, Jennie B. Hanson, Adolph Stern, Herbert C. Davis, Howard D. Kerr and Emil Johnson were sworn and testified on behalf of the plaintiffs and plaintiffs introduced in evidence and filed exhibits marked Nos. 1, 2, 4 and 5 and the plaintiffs rested. John Posehn, Lambert Hagel, F. E. Unsworth, H. F. Bremer, Louie Terkelson, James Geddes, E. E. Amblad, Arthur Morley and F. E. Twining were sworn and testified on behalf of the defendant, and defendant introduced in evidence and filed its exhibits marked Nos. 3, 6, 7, 8, 9, 10, 11 [22] and 12 and the defendant rested. Ida E. Perra, John V. Krall and H. C. Davis were sworn and testified on behalf of the plaintiff in rebuttal, and the plaintiffs again rested. After argument by the counsel J. W. S. Butler, Esq., Attorney for the defendant, made and filed a motion for a directed verdict, which motion was ORDERED denied. After the instructions of the Court to the jury, the jury at 4:59 o'clock P. M. retired to deliberate upon their verdict. ORDERED that the jury be committed to the custody of the U. S. Marshal until such time as they shall have agreed upon a verdict. The verdict shall be signed by the foreman and sealed in an envelope and kept in the custody of the foreman, and the jury shall report its verdict to the Court on Thursday, October 18th, 1928, at ten o'clock A. M. [23]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Thursday, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 18, 1928—TRIAL (RESUMED).

The parties hereto and the jury impaneled being present as heretofore the trial was thereupon resumed. The jury was thereupon asked if they had agreed upon a verdict and through their foreman answered in the affirmative, and thereupon presented a sealed verdict which was opened in the presence of the jury and read and which verdict was ORDERED recorded as follows, viz.:

"We, the jury, find in favor of the plaintiffs and against the defendant and assess the plaintiffs' damages at $2,000.00.

Dated: October 17, 1928.

HARRY S. SANDERSON,
Foreman."

and the jury being asked if said verdict is their verdict, each juror replied that it is. ORDERED

judgment be entered herein in accordance with said verdict and for costs. ORDERED that jurors Geo. H. Richards and Geo. E. Mack be excused until Tuesday, November 13th, 1928, at 10 o'clock A. M. FURTHER ORDERED that all other jurors in attendance this day be excused from further attendance upon this court. [24]

[Title of Court and Cause.]

VERDICT.

We, the jury, find in favor of the plaintiffs and against the defendant and assess the plaintiffs' damages at $2,000.00.

HARRY S. SANDERSON,
Foreman.

Dated: October 17, 1928.

[Endorsed]: Filed at 10 o'clock A. M., October 18, 1928. [25]

In the Northern Division of the United States District Court for the Northern District of California.

No. 475—LAW.

H. J. HANSON and JENNIE B. HANSON,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 17th day of October, 1928, being a day in the October, 1928, Term of said Northern Division of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiffs and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with on the 17th and 18th days of October, 1928, in said Term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury, the jury having subsequently rendered the following verdict, which was ORDERED recorded, to wit:

"We, the jury, find in favor of the plaintiffs and against the defendant and assess the plaintiffs' damages at $2000.00.

Dated October 17th, 1928.

HARRY S. SANDERSON,
Foreman."

and the Court having ORDERED that judgment be entered in accordance with said verdict:

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,— [26]

IT IS ORDERED AND ADJUDGED that the plaintiffs, J. H. Hanson and Jennie B. Hanson, do

have and recover of and from the defendant Sacramento Suburban Fruit Lands Company, a corporation, the sum of Two *Hundred* ($2,000.00) Dollars, and for costs taxed at $33.15.

Judgment entered this 18th day of October, 1928.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [27]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, for the Northern District of California.

Now comes the defendant, Sacramento Suburban Fruit Lands Company, a corporation, by its attorneys, and respectfully shows:

That the defendant, feeling aggrieved by the verdict and judgment thereon in said cause rendered on the 18th day of October, 1928, in favor of plaintiffs and against defendant, for the sum of Two Thousand ($2,000.00) Dollars, damages, with costs amounting to Thirty-three and 10/100 ($33.10) Dollars, hereby petitions the Court for an order allowing the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and that a citation be issued as provided by law, and that a transcript of the record

upon which said judgment was based be sent to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings in this court be suspended and stayed until the determination of the appeal, and that an order be made fixing the amount of surety which said defendant shall give upon this appeal.

Dated: November 27th, 1928.

J. W. S. BUTLER,
EDWARD P. KELLY,
Attorneys for Defendant. [28]

Service hereof is hereby admitted and receipt of copy acknowledged this 27th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Pltfs.

[Endorsed]: Filed Nov. 27, 1928. [29]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the above-entitled cause and makes and files the following assignment of errors, upon which it will rely in its prosecution of the appeal from the verdict and the judgment thereon, herein made and entered on the 18th day of October, 1928, in favor of the plaintiffs, and against this defendant.

I.

The Court erred in overruling defendant's demurrer to the complaint filed in the above-entitled cause.

II.

The Court erred in overruling an objection to a question asked Herbert C. Davis, as follows:

"Q. Can you in some way give us an idea of the extent of the failure over the seven years of your operation?

A. The total loss to the corporation was about $47,000 in—

Mr. KELLY.—That is objected to as immaterial, and no foundation.

The COURT.—Overruled.

Mr. KELLY.—Exception." [30]

III.

The Court erred in overruling defendant's motion for a directed verdict, as follows:

"Mr. BUTLER.—Will you permit me to present a motion for a directed verdict?

The COURT.—Yes, but it comes a little late. The record will show the time the motion is made.

Mr. BUTLER.—Yes. I overlooked it. The defendant moves the Court to direct the jury to render a verdict for the defendant on the following grounds:

(1) That the evidence is insufficient to show that defendant deceived or defrauded plaintiffs in the making of the contract referred to

in plaintiffs' complaint for the purchase by plaintiffs from defendant of land.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land purchased by plaintiffs from defendant, or the value thereof.

(3) That the evidence is insufficient to show that the plaintiffs have been damaged by any act on the part of defendant.

(4) That the evidence shows affirmatively that plaintiffs' cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof, of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiffs' cause of action is not barred by said above quoted provisions of said Section of said Code.

(5) And also that plaintiffs have failed to prove their cause of action. [31]

The COURT.—The record will show the time at which the motion is presented. The Court merely observing that it believes that the evidence is sufficient to call for a determination by the jury, and the motion will be denied.

Mr. BUTLER.—Exception."

IV.

The Court erred in instructing the jury on the subject of the representations claimed to have been made by the defendant to plaintiffs, both as to the growing of fruit and the question of value.

V.

The Court erred in instructing the jury on the

question of the falsity of the alleged representations.

VI.

The Court erred in instructing the jury on the question of defendant's knowledge of the falsity of the alleged representations, as follows:

> "If, however, you find by the greater weight of the evidence the lands were worth less than $275 an acre in 1921, the plaintiffs' case is thus far made out, and we proceed to the next step, —and that is a rule of law, which says, that the defendant, even then, is not liable unless it knew one or the other of those representations were false, if they were both made, or should have known, was neglectful in not knowing, or made them in a positive fashion, and it will not be permitted to deny knowledge at this time.
>
> Remember, Gentlemen, that at that time the defendant had had these lands for eight, or nine, or ten years. Its [32] book says that it sold the first tract out there in 1912. It had been gathering settlers that long on these lands.
>
> It had experts in its employ. It speaks by its advertising. This book says so, Expert Horticultur*al*ist.
>
> An expert horticultur*al*ist is one who knows; and whether or not it is adapted to successful commercial orcharding. That is his business. It had other experts. If it did not know it, why didn't it know? If it was holding these lands out and taking people's money for them

on the representation that they were adapted to successful orcharding, was it not neglectful if it did not know? Furthermore, it asserts in the book—and I suppose, Gentlemen, this famous letter is still here—it says in one letter, which it makes its own, and assumes to be a letter, it is stated that it is positively proven beyond doubt the lands are well adapted to the raising of deciduous fruits commercially.

'Positively proven beyond doubt'—there is nothing stronger than that, Gentlemen of the Jury. As a matter of fact, nothing can be proven beyond doubt. But that is a very positive assertion in kind to impress, and, as counsel in his final argument for the defendant fairly admitted to you that that book was put out to impress those whom they wanted to buy the land. So when the defendant says it is positively proven, it is bound to know the condition of the land. If that representation is false, that the land was well adapted to commercial orcharding, the law imputes to them the knowledge, and they are liable accordingly."

VII.

The Court erred in instructing the jury upon the definition [33] of a "commercial orchard."

VIII.

The Court erred in instructing the jury upon the question of plaintiffs' belief in the alleged representations and their reliance thereon, as follows:

"Then there is another rule of law necessary in plaintiffs' case, and that is, that it is necessary that it appears by the greater weight of the evidence before you that plaintiffs did believe them and rely upon them, and in whole or in part were influenced and induced to buy the land because of them.

Now, again, you apply your common sense to that proposition. Why should he not believe the representation in the book, and the representation of Amblad, if Amblad made representations? The book is enough, so far as the adaptability of the land to commercial orcharding is concerned. They were down in Minnesota. They did not know anything about California, California fruit lands, or fruits, or how to raise them. He was a worker in the Ford factory. He says he believed them. That sounds reasonable and natural. The wife says she believed them, also. He says that believing it, it influenced him. He believed the representation the land was well adapted to fruit farming, commercial orcharding, and believed it was worth $275 and more an acre, and going up. The book says it is going up to $300 an acre when the orchard is in bearing. On the strength of that he says he bought it. If that appears to be reasonable, and proved to you by the greater weight of the evidence, their case is made out. The law says that on the representations made by one to induce another to buy the inference can be drawn that they

did induce him to buy, [34] that he was influenced by it. On the other hand, if you do not believe that those representations influenced the plaintiffs to buy, if you do not, by the greater weight of the evidence, find that they did influence them to buy, then, of course, the plaintiff has no case, because, no matter what false representations are made, if they do not influence them, if they are no inducement to make the bargain, they have not damaged them."

IX.

The Court erred in instructing the jury on the question of the present adaptability of the soil to the raising of fruit, as follows:

"Mr. Twining testified as an expert for the defendant. He tells you that he knows of orchards on hard-pan land generally like this, shallow soil, in Fresno, Merced, Oroville, and elsewhere, and that when the soil is prepared by blasting, that then it will be adapted to successful orcharding. He says that to blast the hard-pan opens it up and the roots can penetrate. Evidently, shallow soil is not enough for successful orcharding. Mr. Twining evidently agrees that far with Mr. Davis, because he says it must be broken up by blasting. Where you have not got five feet you proceed to make more by blasting. You will remember, Gentlemen of the Jury, that when these lands were represented to the plaintiffs as well adapted to commercial orcharding, it was rep-

resented that they were well adapted now—not that they would be made well adapted if you break up sufficient of the hard-pan by blasting. You will remember that this blasting is somewhat costly. Mr. [35] Davis says that it will cost from 60 cents to 75 cents a hole to blast, and that there are from 80 to 100 holes to the acre. That makes a pretty big item. The representation was that the land is—not that the land can be adapted by further exertions in the way of blasting."

X.

The Court erred in instructing the jury on the question of the time of the discovery of the alleged fraud with regard to the statute of limitations, as follows:

"But that is not quite all the case, Gentlemen of the Jury. It appears that the plaintiffs purchased this property away back in 1921, in November of 1921. They came out to see the place in October, 1922. The law is that one who has been defrauded into buying land, as the plaintiffs say they were, must bring their suit within three years after they discover the fact that they have been defrauded, or within three years after they discovered facts which ought, in the judgment of the jury, to have put them on notice, and which, had they pursued the inquiry with diligence, would have made them acquainted with the proof that they had been defrauded. That will be for your determination. They came on the land in 1922. The plaintiff had

found out before he came that there was hard-pan on the land. But, of course, that is not alone the defendant's contention, even to-day, the defendant insists that that hard-pan is no detriment to the land so far as fruit-growing is concerned. You can see that it is a matter not only of disputed opinion, but you must settle the disputations between experts. [36]

The plaintiff testified that he went to see Amblad about what he had heard. He did not know what hard-pan was. He had farmed to some extent, back in Wisconsin, on a general farm. So he told Mr. Amblad about it, and Mr. Amblad said to him, 'Yes, there is hard-pan there, but it is not detrimental to the raising of fruit.' He says he believed Amblad. Amblad was the same party that made the representations to him at the beginning of the bargaining, was a representative of the company, and the plaintiff was still confident that they were dealing fairly with him.

There is a presumption that all transactions are fair and regular; but that presumption, however, may be overcome by the circumstances disclosed in the evidence before you. It is also true that fraud is never presumed, but you may infer it from the evidence and the circumstances before you. He said—inferentially, at least, he had confidence in the truth of this representation.

So he came out here in October, 1922, and he did some work on the land, in the course of which he struck the hard-pan in sinking holes. Finding it

there, he then said that it was hard on the surface, and a little softer below. He developed it in his well pit, and found it eighteen feet deep. Then what did he do? He took the advice of the book. The book says, 'Consult our expert horticultur*al*ist, Mr. McNaughton.' The plaintiff says he did go to see Mr. McNaughton and asked Mr. McNaughton if that was still all right for raising fruit on that land. He says that Mr. McNaughton said, 'Yes, that is volcanic ash, it is a good thing it is there, trees need that, if you blast it the roots will penetrate, and water and air will slack that hard-pan.' [37]

Again he says he believed it. When you ask yourselves whether he did believe it, ask yourselves why he shouldn't believe it? He still had confidence in the fairness of the company. Mr. McNaughton was the company's trusted agent, to whom the settlers were entrusted to go. No one would indicate, perhaps, that that was to keep him from getting information elsewhere, but still that is a circumstance which might well appear.

So he goes to the company's expert, and the company's expert quiets his suspicions, if he had any, gives him reassurance that it was all true, that this hard-pan was valuable, and necessary to contribute to the growth and the productiveness of the trees. He says he believed it. He made no further inquiry, he says. You ask yourselves whether a person in his position ought to listen to every rumor that might pass around, if there was any. He says he heard none. He heard nothing derogatory to

the land until after the time when his suit would be in time, February, 1925. He says, though, that in 1925, having been living on the land, but always working in town, himself,—you have a right to bear that in mind, Gentlemen—he says that in 1925 he proceeded to plant trees. He planted some also in 1926—no, in 1925. The first year he says they did well. That carried him over the time, Gentlemen of the Jury, when his suit would be in time. He says two or three died the next year, several the next year, and several more the the next year, and now they don't look so good. He says that until that time he had no reason to believe the soil was too shallow, and would not grow deciduous fruit commercially. Deciduous fruits are those that lose [38] their leaves every year. He says he did not find out that these representations made to him were false until after February, 1925. His wife says the same thing. If you find by the greater weight of the evidence that that is made out, his suit is in time, and he is entitled to recover at your hands. He was only required to make inquiry when his suspicions were aroused; and if the company's representative allayed his suspicions, and there is no denial that Mr. McNaughton said that—McNaughton has not been called to deny it; so, as I say, if that was a suspicion, and if the company allayed his suspicion, that excuses him for the time being from any further diligence on his part to attempt to prove it false, unless you believe that a prudent man would not have given it any credence whatever. Remember that a person who

thus buys, where it seems to be a matter of expert knowledge, remember that the defendant is still maintaining that the land is adapted to commercial orcharding, and this expert of the defendant, also. The party buying the land does not have to go out and hire experts to see if he can prove that that which was represented to him was false, and on the strength of which he bought the land."

XI.

The Court erred in refusing to instruct the jury on the question of the statute of limitations as requested in defendant's proposed instruction No. 1, reading:

"DEFENDANT'S INSTRUCTION No. 1.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiffs must show that the fraud occurred within three years of the commencement of their action for relief, or if their [39] action was commenced more than three years after the fraud occurred, then they must show, in order to maintain their suit, that they did not discover they had been defrauded until a date within three years of the time they commenced their action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiffs will be presumed to have known whatever with reasonable diligence they might have ascertained concerning the fraud of which they complain.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiffs have proven by a preponderance of the evidence both that they did not discover the alleged fraud within the period of three years before they filed their action, and that they could not have discovered it by the exercise of reasonable diligence, three years before they commenced this suit. They were not permitted to remain inactive after the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them. They are not excused from the making of such discovery even if the plaintiffs in such action remain silent. A claim by the plaintiffs of ignorance at one time of the alleged fraud, and of knowledge at a time within three years of the commencement of their action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that [40] he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiffs contracted with defendant to buy land. Plaintiffs commenced their action on the 28th day of February, 1928; their contract with the defendant for the purchase of its land was made in November, 1921. If you

believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiffs in the making of this contract, then before you can find a verdict in their favor, you must also believe from a preponderance of the evidence that they neither knew of the fraud, nor could, with reasonable diligence, have discovered the fraud before a date three years prior to the commencement of their action, that is, before the 28th day of February, 1925. If you believe from a preponderance of the evidence that plaintiffs either knew of the facts constituting the alleged fraud before February 28th, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant."

XII.

The Court erred in refusing to instruct the jury concerning the effect of the discovery by plaintiffs of the falsity of material representations, as requested in defendant's proposed instruction No. 2, reading as follows:

"DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiffs' discovery of the alleged fraud that if plaintiffs discovered [41] that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the

falsity of any material representation concerning the land."

XIII.

The Court erred in refusing to instruct the jury concerning distinctions between representations of fact and of opinion, as requested in defendant's proposed instruction No. 4, reading:

"DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation."

XIV.

The Court erred in refusing to instruct the jury concerning the effect of plaintiffs having been able by reasonable diligence to discover the falsity of the alleged representations as requested in defendant's proposed instruction No. 5, reading:

"DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered, the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant." [42]

XV.

The Court erred in instructing the jury that defendant by its booklet represented the land sold to plaintiffs to be well adapted to the growing of deciduous fruits commercially.

XVI.

The Court erred in instructing the jury that the statements in defendant's literature applied to the lands purchased by the plaintiffs.

XVII.

The Court erred in holding that plaintiffs had presented evidence sufficient to sustain their cause of action.

XVIII.

The Court erred in not holding that plaintiffs' cause of action was barred by the statute of limitations.

To all of which rulings by the Court, defendant then and there duly and regularly excepted.

WHEREFORE, defendant prays that said judgment be reversed, and held for naught, and that defendant be restored to all which it has lost by reason of said verdict and judgment.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 27th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Pltf.

[Endorsed]: Filed Nov. 27, 1928. [43]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 17th day of October, 1928, the above-entitled cause came regularly on for trial before Hon. George M. Bourquin, Judge of said District Court, and a jury impaneled and sworn to try said cause, and the issues presented by the complaint of the plaintiffs and the answer of defendant, plaintiffs appearing by their attorneys, George E. McCutchen and Ralph H. Lewis, and the defendant, by its attorneys, J. W. S. Butler and Edward P. Kelly, and thereupon the proceedings taken, the evidence given, the objections made, the rulings thereon and the exceptions thereto, were as follows:

TESTIMONY OF J. H. HANSON, IN HIS OWN BEHALF.

J. H. HANSON, one of the plaintiffs, testified in his own behalf as follows:

In 1921 I was living in Minneapolis, Minnesota.

(Testimony of J. H. Hanson.)

I was working for the Ford Motor Company. I was classed as a tire setter. I had never been to California, knew nothing about fruit raising, nor about California lands, or California fruit lands. [44]

At that time I had some dealings with the Sacramento Suburban Fruit Lands Company, through its agent, Mr. Amblad. I had a number of conversations with Mr. Amblad, then in the course of the negotiations, I received a book.

(Witness is shown the booklet entitled, "Poultry Farms and Orchard Homes.")

That is the book I received. I read it through.

Mr. McCUTCHEN.—We offer the book in evidence, limiting our offer for the purpose of showing the representations made. We offer the whole book, however.

(Whereupon the said book was received and marked Plaintiffs' Exhibit 1.)

WITNESS.—Mr. Amblad told me that the land was adapted to all kinds of fruit, and that the literature showed it. He said they were selling at $275 an acre at that time, but it was going to go up in the near future; that the land was really worth more than they were asking. He said that most people started with poultry, especially if they did not have means enough to plant an orchard; that they started in with poultry as an immediate income, and they planted the orchards when they could afford to. He said you could have a commercial orchard; they usually used seven or eight acres for orchard, and

(Testimony of J. H. Hanson.)

the balance was used for poultry. I believed the things that he told me. I did not talk to any other agent of the company.

I signed up a contract. In signing the contract, I was influenced by the things that I had read in the book, and by what had been told me. I believed everything they told me and what I read in the book, as the truth. [45]

(Witness here identified contract, dated September 1, 1921, for lot 22 of the Rio Linda Subdivision No. 5. Whereupon the said contract was received in evidence and marked Plaintiffs' Exhibit 2.)

WITNESS.—I came to California about a year after I bought the land. In the negotiations previous to purchasing I had not discussed the hard-pan conditions out there with Mr. Amblad. After I had signed the contract, and before coming to California, I had a conversation with him about it. About six months after I had signed the contract I met a man who said he came from California. We talked about the Rio Linda district. I asked him if he knew anything about it, and he said that he knew that there was hard-pan there. I went up to the office and saw Mr. Amblad about it, and asked him if it was true they had hard-pan. I did not know just what hard-pan meant. I asked him for information regarding it, and he told me there was hard-pan there; he said it varied in depth from three to six feet from the surface, but that it was not detrimental to the raising of fruit

(Testimony of J. H. Hanson.)

trees. I believed what he told me, and made no further investigation at that time.

About six months after that I came to California. I moved on the land the first part of November, 1922. I started building a poultry-house, and when I put down the posts for the foundation, I encountered hard-pan. The soil varied; in some places it was sixteen inches, and other places it was twenty-two inches. Two feet was about the deepest I found it there.

I put in a well pit about three months after we established residence there. The surface soil when I dug the pit was about fourteen inches, then we struck the hard-pan, which was about eighteen [46] feet thick. The pit was twenty-two feet deep. Under the eighteen feet of hard-pan we ran into sand. There did not seem to be very much difference in the texture of that eighteen feet of hard-pan. It was a little harder right on the surface than it was when we got down about six inches.

At or about that time, I spoke to their horticulturist, Mr. McNaughton, about the effect of that hard-pan on fruit raising, and he said it was not hard-pan, that it was volcanic ash, that it was a good thing that it was there; that the trees needed it, and that by blasting and planting the trees in that, the roots would penetrate, and also when the air and water got down there that would air-slack. I believed what he told me.

I didn't plant any trees until the spring of 1925, at which time I planted about thirty trees. I

(Testimony of J. H. Hanson.)

cared for those trees, cultivated, irrigated and pruned them.

The first year they did fairly well, a couple of them died. The next year three or four died. The third year there were several of them died, most of them. They don't look very good now. I don't know why they don't look good, unless it is that the soil is too shallow. That is the only reason I can account for it.

I got a deed to this place instead of the contract. I executed several deeds of trust; one of them was to the F. A. Bean Foundation. All the money on that deed of trust was paid to the Sacramento Suburban Fruit Lands Company.

Prior to March, 1925, I did not find that the land was not adapted to raising fruit-trees. Nobody in the neighborhood ever told me anything about it. Prior to that time I did not learn that the land was not worth $275 an acre. Up to that time I had not borrowed any money on my land. I had not had any dealings with any real estate agents or with anyone about it. [47]

The cost of the trees and the planting of them cost me about forty-five dollars. That is the money that I actually paid out. I hired the later cultivation done, and that cost me about forty dollars. I used a windmill for power to irrigate part of the time; after I put in my electric pump, I used it for other things. The cost of irrigating is all mixed up with the other items.

(Testimony of J. H. Hanson.)

Cross-examination.

I will be forty-two years old on the 12th of November. I moved to Minneapolis in the spring of 1919, from Chetak, Baronet County, Wisconsin. Prior to coming to Minneapolis, I was engaged in diversified farming for a year and a half in Wisconsin. I got married in 1921.

I cannot recall the name of the man who came back from California and told me about hard-pan. I cannot say that I knew him personally, other than that he worked right near me for the Ford Motor Company. I had not heard of hard-pan up until that time. He heard a friend of mine and myself discussing Rio Linda. We were interested in the literature we received from the Sacramento Suburban Fruit Lands Company, and we were discussing it during the lunch hour one day, and this man said that he hoped we were not buying Rio Linda land. I asked him why and he said that it was all hard-pan. I asked him what he knew about the land and if he had ever been on it and he said that he had not been on it but his father worked for the Sacramento Suburban Fruit Lands Company when the land was laid out and had told him that it was all hard-pan. He did not tell me what hard-pan was.

We arrived at Sacramento on the 25th of October, 1922, and moved on to our land on the 11th of November, the same year. There were quite a few settlers not so very far away from our lot. [48]

(Testimony of J. H. Hanson.)

The first day we were out there, we drove around over the district. Most of the people seemed to be in the poultry business. We did not see any fruit orchards right near where my land is located. The only orchards I saw were around Rio Linda, right near the town site, and along the highway. There were a few fairly large orchards along the creek, there, right near the Rio Linda town site.

I did not talk with any of my neighbors about the soil, nor did I talk with anybody around Sacramento about raising fruit on the land that I had bought.

I dug my well immediately after establishing residence. The well pit was twenty-two feet deep. At that time I understood there was hard-pan there. I did not inquire of anybody other than Mr. McNaughton, the horticultural adviser, as to what hard-pan was.

I moved on to the land on the 11th day of November, 1922. I went to work for the S. P. Company, in the shops, the following spring, and I worked there for about six weeks; then I was employed by the American Railway Express Company, where I have been working since. I have worked downtown practically all the time since I moved there.

I planted thirty fruit-trees. I blasted for the trees; that is, I had the blasting done. I saw the soil where the blasting was done and knew it was hard-pan. I did not make any inquiry about hard-pan then, other than from Mr. McNaughton. Mr.

(Testimony of J. H. Hanson.)

Henry Jensen, a neighbor of mine, blasted the trees for me. I went into the poultry business after I came here. I brooded some chicks the first spring, 1,200. Mr. Amblad had talked with me about the poultry business before I came here.

TESTIMONY OF JENNIE B. HANSON, IN HER OWN BEHALF.

JENNIE B. HANSON, one of the plaintiffs, testified in her own behalf as follows: [49]

I am the wife of Mr. J. H. Hanson. I was living back in Minneapolis in 1921. I had never been to California and knew nothing about California lands, or values, or about fruit raising.

I did not talk to Mr. Amblad. We got the literature, Plaintiffs' Exhibit 1, and I read it through and believed it. I did not sign the contract.

After we came to California, I never heard from anyone, before March, 1925, that this land was not good fruit land, or that it was not worth $275 an acre. I never found out anything along those lines prior to March, 1925.

I did not know enough about hard-pan for it to make me think the land was not fruit land.

Cross-examination.

We are still living on our place.

(Witness is shown photograph of her property and affirms same as being a fair picture of said

(Testimony of Adolph Stern.)

property for the present year. Whereupon, the said picture is received and marked Defendant's Exhibit 3.)

TESTIMONY OF ADOLPH STERN, FOR PLAINTIFFS.

ADOLPH STERN, a witness for plaintiffs, testified:

I live out in the Rio Linda section and have had experience out there trying to grow trees on those shallow lands. The depth of my land runs from six inches to three and a half or four feet on one small place.

I planted five acres in Kadota figs, 530 trees, and also a family orchard of 27 trees. I planted my commercial orchard in 1923, and the family orchard in the spring of 1924. [50]

I plowed in the spring and plowed in the fall, and had discing done, and I cultivated the trees during the summer, and irrigated them, and pruned them. They did fairly well the first couple of years, and after that they started to grow more uneven every year. I replanted ninety-four trees in the figs, and there are about one hundred dead now. The trees that were in shallow soil grew in all these years about a foot and a half or two feet; on that small place where there was three and a half or four feet of soil, I have eight or ten trees that are eight to twelve feet tall. I do not give the trees on the deep soil more attention than I

(Testimony of Adolph Stern.)

give the others. The trees in general are not thriving, and they are not productive. Their general condition is poor and they are stunted.

I have looked around the district and seen what other efforts at fruit raising have done, ever since I planted mine, because other people planted fig trees out there, and we were trying to see who could grow the best trees, a kind of a rivalry; so I observed the care and attention other trees got. The depth of soil where the trees are planted vary a few inches in all instances, but they are all on upland, the same kind of land that I have. The land out there is not adapted to the raising of fruit-trees.

Cross-examination.

I know Mr. Hanson. I came here in August and he came in October. His south line is my north line, making a straight line diagonally across the road; his land is the ten acres north of mine, across the road.

I planted my trees in the spring of 1923, the spring after Mr. Hanson came here. I blasted for some of them. I saw the soil and the hard-pan. I did not talk with Mr. Hanson about that.

I have been a plaintiff in a lawsuit of the same character [51] as this, pending in this court, and I am a contributor to a fund to maintain the expenses of the lawsuits, generally.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFFS.

HERBERT C. DAVIS, a witness for plaintiffs, testified:

I am an agricultural specialist with the firm of Techow & Davis, engineers and chemists. I attended the University of California for about three years, and after leaving school, I had practical experience along that line at Antelope, Sacramento County. Part of the lands that we farmed there practically adjoin subdivision 5 of Rio Linda Colony, on the northeast corner. I was on those lands, altogether, before and after school, about twelve years. I was actually on the land seven years as manager of the United Orchards Company. I lived on the land some years before that, it was my home. My mother lived there.

I had full charge of all the work for the United Orchards Company. We owned about 150 acres; we farmed a good deal more than that. We attempted to raise fruit there. The soil averaged about four feet in depth on the fruit land. We had mostly almonds, although we had a number of other varieties of fruit. That whole project was an entire failure. We could not get any production on it, at all.

Q. Can you in some way give us an idea of the extent of the failure over the seven years of your operation?

(Testimony of Herbert C. Davis.)

A. The total loss to the corporation was about $47,000 in—

Mr. KELLY.—That is objected to as immaterial, and no foundation.

The COURT.—Overruled.

Mr. KELLY.—Exception.

WITNESS.—After that I had my laboratory here in Sacramento. We have [52] a general chemical laboratory and engineering office. I specialize in agricultural work. I test soils to determine their chemical analyses and determine the plant food in them. I have a good deal of experience along that line back of me. I did some of that work while I was on the land at Antelope

I examined the lands of the plaintiffs in this case; made some borings out there and made a map showing the results of my examination. The figures on the map in parentheses indicate the depth of the soil in inches to hard-pan. That correctly shows the conditions on the tract. The dots, alone, indicate that a sounding was made with a steel rod, to determine the depth, and where the circle is around the dot it indicates that a boring was made with an auger. That part down at the bottom of the map, labeled, "Cross-section, hard-pan, clay," is a cross-section through the center line of the property east and west, showing the relation between the soil and the strata of sand and hard-pan. That correctly shows the situation at that point.

(Whereupon the map was offered and received in evidence and marked Plaintiffs' Exhibit 4.)

(Testimony of Herbert C. Davis.)

WITNESS.—I made some chemical analyses of soil. I got the samples at the points indicating that a boring was made. I think there are, altogether, three borings. I made a composite sample from the whole business; then I made a chemical test of that sample, using the strong acid soluble method. The results of the test were: Potash, .128 per cent, equivalent to 5,120 pounds per acre-foot; phosphoric acid, .037 per cent, equivalent to 1,480 pounds per acre-foot; lime, .376 per cent, equivalent to 15,050 pounds per acre-foot; nitrogen, .251 per cent, equivalent to 10,040 pounds [53] per acre-foot; humus, .34 per cent, equivalent to 13,600 pounds per acre-foot.

In that particular tract there are two general types of soil; about on the north half of the tract is a grey adobe soil, and the south half is the characteristic red San Joaquin sandy loam. We attempted to get a sample that would fairly represent the average condition over the tract, avoiding those places that obviously had been fertilized, so as to get the condition of the raw land.

The content of potash and phosphoric acid that we found is about one-half of what we would expect to find in a medium or even very poor soil.

The clay shown on the map is included in the depth to hard-pan, a strata averaging about five or six inches. It runs uniformly over the land on the north half, where the soil is the adobe type. The clay is a grey clay. On the south half it is a red clay, the same as the upper soil. That clay does

(Testimony of Herbert C. Davis.)

more harm than good where it is underlaid with hard-pan that way. The clay sucks up a lot of water in the winter-time, and holds it over a long period of time, keeping the soil cold, and it has a tendency to drown out the roots of the plants that penetrate into it. The soil depth on that land averages nineteen inches. The thickness of the clay runs at an average of five inches and that is included in the nineteen-inch average. I made an examination of the hard-pan on the surface there, and I obtained these samples that you have here off the Hanson place. I think I got them on the 6th of October, the date of my examination is on the map. I got them near the west border of the property where the hard-pan came quite close to the surface; they struck it in plowing. The plow furrows were opened and we were able to pry that hard-pan loose. There are two types of hard-pan there; the sample that is greyer on top and lighter underneath is the surface crust of [54] the hard-pan. I should say it was three or four inches in thickness. Underneath it is this second sample, somewhat softer, finer-grained material; it is not quite so heavy. For agricultural purposes you call it all the same thing. I did not find out the depth of the hard-pan on that particular tract. The well pit was cemented up. I examined some of the pits on the surrounding tracts, though.

(The hard-pan samples were here received in evidence and marked Plaintiffs' Exhibit 5.)

(Testimony of Herbert C. Davis.)

WITNESS. — The lower layer of hard-pan is fairly uniform throughout the whole tract out there. The second sample, of that lighter stuff, represents the bulk of the hard-pan that I found in the examination of the pit. In the Stern property, which is across the road from the Hanson property, there is twenty-one feet of hard-pan exposed; it is fairly uniform, and is of that grey material. The Schreindl pit, a little bit further down the road, has thirteen feet. Over to the south, on the Johnson property, there is thirteen feet. On the Soderman property, there are ten and a half feet exposed. Most of those pits have hard-pan still in the bottom. There is just that much of it exposed.

The Hanson property is not at all adapted to fruit raising. The very first requirement for commercial production of fruit is depth of soil, a minimum of about five feet being considered necessary. The upper three feet of soil provide space for the growing of the feeder roots on the tree, and provide the storage for the plant food, the area for the roots; the lower strata of soil permits the penetration of the roots, and form an anchorage, and to absorb moisture, and the whole area of the five feet or more acts as a reservoir for the storage of moisture, and to provide drainage, which is a very important feature, so that the water, applied either by irrigation or [55] through the winter rains, will not stand around the roots of the tree, particularly the feeder roots.

It would not be possible to blast the soil and pro-

(Testimony of Herbert C. Davis.)

vide sufficient depth in that way in this particular type, the hard-pan is too thick. Where the hard-pan is underlaid by sand or soil at a reasonable depth, say if the hard-pan would not exceed two feet or two and a half feet in thickness, you could blast through it and form a contact all the way down, and it would be just the same as a deep soil. Where the hard-pan is as thick as this, you would blow out a pothole, and it would eventually fill up with water, and the tree roots would penetrate into it, and you would have sour sap and difficulty with the trees. The lower layer would not dissolve in water if the top layer were shattered as long as it was in place in the ground, because there are some places where there is no top layer, at all, and that material is exposed. The pressure of the surrounding country holds that in place. It does not soften up or absorb moisture to amount to anything. Some of that grey hard-pan, if thrown out on the surface, might crumble away in time. I have seen a great deal of it lying out two, or three and four years, right on my own property, identically the same stuff, and it did not disintegrate at all, unless it was ground up. The disintegration which occurs on the surface would not occur if it were in place in the ground; otherwise, there would be no hard-pan there, because there are plenty of places where the surface has been broken by nature, and water would have penetrated it. You find ditches, and cuts and cracks in the land out there and this hard-

(Testimony of Herbert C. Davis.)

pan exposed and in those places it does not show any signs of disintegration.

Cross-examination.

I am very nearly thirty years of age. I am not a graduate [56] of the University of California. I have had practical experience on a fruit land ranch. I lived out there before I went to school. That was my home, and I worked on the ranch that my mother owned there during vacations. My personal experience so far as being personally responsible for the work of the ranch started in 1919.

Q. And that was after you had finished your work in school?

A. Yes—not after I had finished all of it.

I knew at that time that it required a minimum of five feet of soil to raise fruit successfully. I had learned that in school. I had that knowledge when I made the purchase, and invested my money and commenced the operation of this ranch at Antelope.

I completed the analysis which I have given in the last two or three days. I have made analyses of samples of the soil, generally, over the entire Rio Linda district. There is a good deal of uniformity. Of course, in spots we find some differences in the analyses. That is to be expected. Generally, it runs fairly uniform. This particular analysis, I think, is just a trifle higher in results than the average that we have been finding, but it is triflingly different. It does not amount to anything. I made the analysis of the sample in question by the

(Testimony of Herbert C. Davis.)

so-called strong acid soluble method. That is a standard test, recognized by chemists generally for a particular purpose. There are, altogether, four different methods used in analyzing soils. I would not say that one was more modern than the other.

I am not a member of the Association of Official Chemists; that membership is limited to chemists in the employ of the State or of the Government, who are enforcing law. I am a member of the American Chemical Society, however. I am president of the chapter here. As a tentative method, the association of official chemists have published the so-called fusion method. That determines the [57] total quantity of anything that you want to know about the soil, irrespective of whether it is available to the plants, or usable in agricultural land. It is simply the total quantity, the same as you would analyze a rock, or a piece of granite. The acid soluble test does not give the total content of the soil. The fusion test gives the total content of the soil. Chemists, following that same test, on the same sample should, on either test, get the same result of soil content.

Redirect Examination.

That is true of either test. I selected the acid soluble test to determine the quantity of the material in the soil that would reasonably be expected ever to be available during the life of the orchard as plant food. Also, practically all of the text-books and authorities, to which we would refer to

(Testimony of Herbert C. Davis.)

for their analysis in order to make a comparison as to whether or not it was sufficient, were based on the acid soluble test. All of Hilgard's work was based on that, and he so specifies. The fusion method produces soil constituents which are not available for plant food, it takes everything that is there, whether it is available for plant food or not. There may be some of those elements in the soil that are not available to the plant; if they were incorporated in a coarse grain of sand or other material inside they would not be available to the plant at all. They would have to be fairly soluble in acid or water to be used by the plant, and sucked up by the roots. In other words, they must be soluble before the plant can make use of them. With the strong acid of the acid soluble test, you would take out everything that reasonably could be expected ever to be utilized by the plant. I think it is highly improbable that the content of the soil available for plant growth will not be gotten out, or shown, by the acid soluble test. [58]

Mr. KELLY.—Q. Then it does depend on the strength of the acid used in that analysis, does it not?

A. It does, and that acid strength is specified very clearly.

The COURT.—Q. What association did you say you belong to?

A. The American Chemical Society.

Q. Is that composed, generally, of chemists from all over the country?

(Testimony of Herbert C. Davis.)

A. Yes, it is a national organization.

Q. Do they recognize this test?

A. They do not recognize or publish anything.

Mr. KELLY.—Q. This test has not been used for years, has it, generally, by chemists?

A. Oh, yes.

TESTIMONY OF HOWARD D. KERR, FOR PLAINTIFFS.

HOWARD D. KERR, a witness for plaintiffs, testified:

I am a real estate broker and have been for nine years. I specialize in country property, and am familiar with the lands out in Rio Linda now occupied by the plaintiffs in this case. I was familiar with the general country out there in 1921.

Q. Taking you back to the month of September, 1921, what, in your opinion, was the value of the Hanson place, or the place designated as Lot No. 22, of Rio Linda subdivision No. 5?

A. May I check that just a moment, please?

Q. Yes. I am speaking of the place now occupied by the Hansons.

A. $50 an acre for the west half, and $75 an acre for the east half.

Q. That was the 1st day of November, 1921; were values any different as between September and November of that year? A. No. [59]

Cross-examination.

Mr. KELLY.—Q. What were those figures, Mr. Kerr?

(Testimony of Howard D. Kerr.)

A. The east half $75, and the west half $50.

Q. You made an examination of the Lindquist property, which you testified about on yesterday?

A. Yes.

Q. What is the difference in the lands of Mr Hanson and those of Mr. Lindquist?

A. There are two Lindquists, I have forgotten which one was involved in the case that was tried yesterday.

Q. I think it was A. J. (H. A.) Lindquist. We were talking about it yesterday.

A. What was the number of yesterday's case?

The COURT.—Well, if you don't remember say so, and we will pass on.

A. I can tell in just a moment, your Honor. The Lindquist is practically all high ground, with the exception of about three acres of low land, which gives it the proper drainage it should have for the raising of chickens, and anything else up there that the soil will produce. In this particular case we have practically the west five acres would be no use for anything unless it was hooked on to the other piece, just as it is now.

Q. How far is the Hanson property from the Lindquist property?

A. It is probably a mile and a half. I am just guessing at that.

Q. When did you make an examination of the Hanson property? A. Yesterday afternoon.

Q. That was the first time you saw it?

A. Yes, sir.

(Testimony of Howard D. Kerr.)

Q. How long were you there?

A. About twenty minutes. [60]

Q. Did you make any borings? A. No, sir.

Q. Did you examine the drainage other than as your eye could catch the contour of the land?

A. Just with my eye.

Q. And from that examination of yesterday, you fixed the value of $50 and $75 as you have stated, in 1921? A. Yes, sir.

Q. Did you take into consideration the adaptability of that land for fruit raising?

A. I did, yes.

Q. Do you or do you not?

A. I do, but I don't think it is fruit land.

Q. In fixing a value, you do not think that, do you? A. No, sir, I do not.

Q. Do you take into consideration the reputation in the community that the land has for the raising of fruit, in fixing the value?

A. I take that into consideration, yes.

Q. What is that reputation?

A. I don't think it is a fruit section.

The COURT.—No, no. You are asked what the reputation is, if you know it. Reputation is what people say about a thing.

A. It is practically the same as this piece of land. It is just a question of the typography of the land.

Q. Do you know what reputation is?

A. One after the other.

Q. Reputation.

(Testimony of Howard D. Kerr.)

A. Oh, I thought he said repetition.

Q. No, reputation. Have you talked with anybody out there about it, or have you heard others talk about it? [61]

A. I have not talked with anybody out there.

Mr. KELLY.—Q. Then you don't know what the reputation of it was in 1921?

A. Not among the people out there, no.

Q. So you could not take that into consideration, could you?

A. No. It is just my general knowledge gained in the real estate business.

Q. Assuming that that land were adapted to the successful raising of deciduous fruit, what would you say that the value of it would be, say, in 1921?

A. Around $125 or $150 an acre.

Q. That would make some difference, then, in the value, would it? A. Oh, yes.

Q. And that is true with that land in that community, generally, including the Lindquist land which you examined just the other day?

A. If it was better land than fruit land, yes.

Q. If it were adapted to fruit land, it would have a greater value? A. Yes.

Q. Yesterday morning, in the trial of the case of H. A. Lindquist against this company, were you not asked this question: "Assuming, Mr. Kerr, that this land was adapted to the successful raising of deciduous fruit, what would be its value?" or substantially to that effect, to which you answered, "It

(Testimony of Howard D. Kerr.)

would be the same, $75 an acre." Was that question asked you, and did you make that answer?

A. I made that answer, yes.

Redirect Examination.

Mr. McCUTCHEN.—Q. Do you care to explain that, Mr. Kerr? [62]

A. I meant to convey that if that was the same class of land as it is it would not make any difference, but, of course, if it was better land, and adapted to fruit, etc., it would have a different value.

TESTIMONY OF EMIL JOHNSON, FOR PLAINTIFFS.

EMIL JOHNSON, a witness for plaintiffs, testified:

I bought land out in Rio Linda in 1923. I planted trees, about sixty-five, in 1924. I cared for them, cultivated, pruned and irrigated them. The soil depth where they were planted was from six inches to two and a half feet. The trees are doing poor. Seventeen are dead, and the rest are in poor condition. A few peach trees bore a little fruit, but nothing to talk about. The trees grew probably five feet high, and like that. Some spread out and had lots of leaves on them, and some did not.

I have seen other people trying to plant trees. The land is absolutely not adapted to fruit raising.

Cross-examination.

I went on my place shortly after I arrived here

(Testimony of Emil Johnson.)

in 1923. I should say I am not quite a quarter of a mile from Mr. Hanson's place. I did not know Mr. Hanson when he first came to the district; I was not there. I did not later come to know Mr. Hanson, and have not talked with him about the country, the soil either, since 1923. I have talked with him. I have not neighbored with him.

I have been a plaintiff in a lawsuit of similar character to the one being tried, pending in this court, and am contributing for the maintenance of these actions, generally.

Redirect Examination.

My suit has been tried and I got my judgment. [63]

TESTIMONY OF JOHN POSEHN, FOR DEFENDANT.

JOHN POSEHN, a witness called for defendant, testified:

I live in the Rio Linda district. I have ten acres. I bought my land in 1923, unimproved. When I moved on the land I planted a portion of it to fruit-trees. I planted about forty trees, a family orchard. I have plums, peaches, figs, nectarines, cherries, apricots, pears. The soil depth on my place where I planted the orchard is a half a foot, a foot and two feet. There was hard-pan under the ground where I planted, and I blasted for all of the trees. After I blasted the ground, it let the

(Testimony of John Posehn.)

water through, and there was good drainage there in the holes. The growth of the trees has been very good. I measured some twelve feet high, sixteen feet wide, and about sixteen inches round over the ground. The trees have plenty of leaves on them, and look nice. All of the trees look good. I lost two trees in the winter of 1926–27. There was so much water there, and I should have drained it off. That was the reason I lost the trees, it was my fault. There was lots of rain that winter and the water stood on top of the ground. When the two trees died I took them out and replanted and have had no trouble with the trees that I replanted. They have grown well. I have all the fruit I need, and there is some on the ground. All my trees are young; they have not come into full bearing. I have plenty of fruit for my family use and more left on the ground. I think that land out there is good land for fruit-trees.

I have some grape-vines. I am in the poultry business; have fifteen hundred chickens. The depth of the soil where my grape-vines are is just about the same as the depth of soil in the orchard. I did not blast for the grape-vines. They grow very good. I planted them in 1925, and I had a good crop last year. The vines are good and strong, have lots of leaves on them and lots of stems. I cut [64] some Thompson Seedless, and there was sixty pounds on one vine, and next to that was forty-five pounds; and I cut some Malagas that had forty-one pounds. I have my own sugar scale, and I have

(Testimony of John Posehn.)

twenty-two per cent sugar. The grapes are very sweet. Some of them I irrigate, and some I do not, and the ones that I do not irrigate are the sweetest.

I raise greens for my chickens. I have alfalfa, Soudan grass, China cabbage and barley. They all grow very well. I use fertilizer on the soil for the greens, and I irrigate them. We have an overhead irrigation which is very handy. Where irrigated, the greens grow well.

My son, Robert, has a place right next to mine. He has five acres, and he has about fourteen hundred chickens. He has a family orchard of about forty trees. I planted his trees, and they have grown well. He has some fig trees which I measured the other day and found them to be twelve feet high, twenty inches round above the ground, and loaded with figs. All of his trees bear well. He also has some ornamental trees and shrubs around his place. They all grow well; I planted some ornamental trees, just like around this building. They are some thirty feet high and thirty inches round over the ground. I planted them in 1924. We dug a well pit on Robert's place. There is hard-pan about an inch or two inches in the pit and under that some more hard stuff, but you can pick it with a pick. When we took the material out of the well pit, Robert spread it out on his ground. It just goes like chalk. The pieces that are about two inches, stay hard, but not the rest. He has all the vegetables he wants on that land.

(Testimony of John Posehn.)

(At this point pictures of both the witness' property and that of his son, Robert, were received and marked Defendant's Exhibit 6.) [65]

Cross-examination.

Two peach trees died on my place in the winter of 1926–27. It was my fault that they died, I should have drained the rain water off.

The well pit that I dug was thirty-two feet deep; the hard-pan was two inches thick. I would not call the material found below that two inches, hard-pan.

Q. Below that was a substance very similar to this, showing you Plaintiffs' Exhibit 5?

A. No, that is different stuff, that is too hard.

I could pick that material below the two inches of hard-pan, but I blasted all the way to make headway. I could pick it, but it would take a long time.

I sold 1,072 pounds of grapes this fall, 1928. That is all the fruit I ever sold from my place. I bought some fruit last year, and some this year. I do not patronize the vegetable man out there. He does a fruit business, but not on my place.

Redirect Examination.

Last year I bought one pail of plums; I had my own, but a poor man came around and I thought I would buy a pail from him. He had a different kind of plums than mine. I bought one lug box of peaches from Mrs. Fred Reames, freestone peaches.

(Testimony of John Posehn.)

I have not got them on my place, and I bought one box. The kind of fruit I bought was the kind of fruit that I do not have on my place.

Mr. LEWIS.—Q. You bought some grapes from Archie Phelps, didn't you?

A. No, I have grapes to sell.

TESTIMONY OF LAMBERT HAGEL, FOR DEFENDANT.

LAMBERT HAGEL, a witness for the defendant, testified:

I own forty acres out in Rio Linda. I have owned it a little [66] over five years. My land was unimproved, at the time I purchased it. I planted fifty-eight fruit-trees for family orchard. I do not raise fruit commercially. Besides my grapes, I am in the poultry business, having fourteen hundred chickens. I have only been in the poultry business the last three years.

I know the general district throughout Rio Linda; the principal industry out there is poultry.

The depth of the soil where I planted my fruit-trees runs all the way from seven inches to twenty-four inches. I blasted for the trees. There is hard-pan for about an inch and a half and then underneath that is a hard substance that goes on down when it is dry. The soil underneath the hard-pan is a little harder than the top soil, but it is good soil.

I blasted my holes for the trees in the fall, and I

(Testimony of Lambert Hagel.)

left them standing open over the winter, and in the spring I found one that did not have any drainage, and I blasted that one again, and I planted all my trees, and they have done well ever since. After I blasted that one hole the second time, there was plenty of drainage in that. The trees have made a wonderful growth. I have two nectarine trees planted on twelve inches of soil. The trunk on those is six inches in diameter; they are about fifteen feet high, good and wide. I got about three lug boxes full of nectarines to the tree, very big in size and good in flavor. My cherry trees run all the way from two and a half to three and a half inches round the trunk, and all the way from twelve to fifteen feet high, except one that is a little weaker than the rest. All the rest of my trees are about the same size.

The material taken from the holes when blasting is done becomes just like ordinary soil on top. I have a wonderful lawn from [67] that stuff.

For three different seasons I have worked in fruit for experience in the foothills, in Auburn, Newcastle and Penryn. That is shallow soil up there, and they have hard-pan, too, and there is nothing but fruit up in that country.

I know Mr. Stern's orchard; I pass by there practically every week. I have seen it grow and know its condition. The Stern orchard was good the first two years after he had it planted, but since this sour sap went through the country, when nearly everybody lost some trees from sour sap,

(Testimony of Lambert Hagel.)

and, of course, since these trials have started, they kind of neglected their place and have not looked after it. They plow and disc it once in the spring, but they do it after the moisture is gone out of the ground. That is the way they have worked it. It doesn't do any good to plow, disc and harrow if you don't come in time and do it. I would say that his orchard is in poor condition on account of neglect.

I have twenty-eight acres of vines planted. The oldest are about three and one-half years old. I planted from cuttings, and did not blast. The soil depth in the vineyard varies all the way from six inches up to thirty-two inches. The vines have made a wonderful growth. None of them died. I never put a drop of water on them since they were planted. I cultivate as often as is necessary, and I subsoil my land. I have been cultivating my land eight times last summer, in order to keep the wind out of it. Every time it cracks a little you put a little soil over it. You have to keep it air-tight. I find that I keep enough moisture in the soil to feed the vines without irrigation. I have about four acres of grapes hanging on the vines yet, and the grapes are good and the vines are good. The nine acres that I have will produce somewhere around nine tons of grapes. I am figuring on about nine tons when I have them all in, together with what I have sold [68] already. That is this year.

That would be about a ton to the acre. The vines are young and they were not pruned for a

(Testimony of Lambert Hagel.)

crop this spring. I pruned them for shape, and not for crop. It will take another year before they reach their full bearing. A ton to the acre for those vines, considering their age and their pruning is a very good production. I shipped some to the Fruit Exchange, and the Government tested them; they tested from twenty-two to twenty-four per cent sugar. They are graded as No. 1.

In my opinion the soil on my place is adapted to the raising of fruit, and I have no doubt that if a man worked the same as I do out in that district, he would get a good growth. Considering proper preparation and care, I consider the land is adapted to the raising of fruit. You have to care for your fruit anywhere, even in the Newcastle district.

(Witness is shown picture of his vineyard.)

This was taken this year, and is a picture of a vine in my vineyard. From one particular vine last year, grown on six inches of soil, I took off twenty pounds. The vine was two and a half years old at that time. I will mention this, also, that not every vine had that much, but some of the vines had as much growth as this vine and no grapes on them, and I also have some vines that had as high as forty-five pounds.

(The said picture was received in evidence and marked Defendant's Exhibit 7.)

Cross-examination.

I sold grapes from my place in 1927. I did not ask the names of the parties to whom I sold. I

(Testimony of Lambert Hagel.)

sold between four and six tons. I sold them by the lug. You call a lug box so much weight, and a man comes and wants so many lugs, and that is what we go by. In 1928, I sold about six and a half tons. My business is poultry and commercial [69] grape growing. I have bought raisin grapes, and sold them on the vine. I bought a field of grapes in 1927 and sold them to some of the neighbors. There is John Brown, and Henry Brown, and Henry Posehn, and Charley Beaver, and Charley Wilder, here in Sacramento, and several more; I didn't ask their names. Those parties are living out in the district, except one, and one moved away. The chief business out there is poultry. Whoever wants to, or has to, works for wages elsewhere, but I could not say that practically everybody has to work out in order to make a living. I started with four hundred dollars and now I have a property there that is worth about $25,000, and it is all paid for. This year I have received somewhere around two hundred and fifty dollars from fruit. I cannot expect to receive any more, because my place is not in bearing yet. Three of the members of my family are employed elsewhere. My wife works in the cannery; my boys work out for wages. I have not for the last three years. The poultry has been my chief source of income.

I had a conversation with John V. Kral at his place in December of 1927. I told him that he should plant grapes on his place, that grapes is a paying proposition. I told him the reason why not

(Testimony of Lambert Hagel.)

to plant tree fruit was because there was an overproduction of tree fruit, and there was no market for it. I did not say that tree fruit would not grow on shallow hard-pan land such as was in Rio Linda, or anything of the kind. I did not state that I had not bought from the defendant company or that all of those that had bought from it had been cheated. I said nothing of the kind.

Q. Do you recall a conversation, again, at Mr. Kral's house, in the latter part of November, 1927, Mr. and Mrs. Perra being present, Mr. and Mrs. Klein, and Mr. and Mrs. Kral, and did you not, in response to a question by Mrs. Perra, at that time, state that Rio Linda land was too shallow for tree fruit raising? [70] A. Nothing of the kind.

Q. That it was foolish to plant tree fruit there, and expect it to grow? A. Nothing of the kind.

I did not tell Mrs. Perra, at or about that time, how I disposed of my grapes in 1927. I did not tell her that I had made wine out of them, or anything of the kind.

TESTIMONY OF F. E. UNSWORTH, FOR DEFENDANT.

F. E. UNSWORTH, a witness for defendant, testified:

I live out in Rio Linda district on the highway, this side of the town site of Rio Linda. I have five acres. I bought last October. A portion of my

(Testimony of F. E. Unsworth.)

land is planted to fruit; mostly Tuscan peaches. There is land in the orchard less than five feet in depth, where the peach trees are planted, and as shallow as thirty inches. I understand the trees are about eight years old. They are still alive and growing. They have made a very good growth. I had a good crop off them this year. There was no market for it. There were great big peaches, very good quality and good flavor. I sold them to anyone I could locally. I sold about a ton to one party that came in there. I understood he was going up north with them. There was a great deal left on the trees and on the ground. Off of one particular tree I got about five lug boxes. There are forty to forty-five pounds to a lug box. That is a very good production. I lived in California at the time I bought; I have lived in Sacramento County for upwards of thirty years and am familiar with the county. I consider the land where I am located, adapted to the raising of fruit commercially. I also raise flowers and ornamental plants and vines. Everything seems to grow well.

(Picture of the witness' property was here received in evidence and marked Defendant's Exhibit 8.) [71]

Cross-examination.

I am a meat-cutter by occupation. Prior to 1927 I had had no personal experience in raising fruit, but I had seen lots of fruit. Since I have been out in Rio Linda I have sold about one hundred dol-

(Testimony of H. F. Bremer.)

lars' worth of fruit from my place. That is from three acres.

TESTIMONY OF H. F. BREMER, FOR DEFENDANT.

H. F. BREMER, a witness for defendant, testified:

I live in the Rio Linda district and am engaged in the poultry business. I first purchased a piece of property in Rio Linda in 1922. I bought eleven and a fraction acres at that time, and planted some fruit-trees. The depth of the soil where I planted was about two and a half feet. I did not blast for them right away, but after they were planted and when the weather got dry; we planted the fruit-trees in January and February, and blasted that summer right beside the trees. That provided sufficient moisture as nourishment for the trees and ample drainage to take care of the winter water. You have to irrigate in the summer. While I was there the trees made a pretty good growth. I was there about two years, then sold the place. Later on I purchased another place half a mile east from the place that I first owned. I was then engaged in the poultry business and have been since. I have 2,500, and some baby chicks; about a thousand.

I have frequently seen the place that I first owned; I pass by there going to and coming from town, and I have also visited the place. I have ob-

(Testimony of H. F. Bremer.)

served the growth of the fruit-trees there. They have made a pretty good growth. They have had fruit on them. The trees were planted in 1923, five years ago. There was a crop of fruit on those young trees this year; they produced pretty good. I sampled the quality and flavor of the fruit and found it to be good. The fruit [72] was also good in size.

Where I now live I just planted a few trees. I did not blast for them. The soil where I planted them was two and one-half feet deep. I planted them in the spring of 1926. I also planted some last spring. They are still alive and have made a pretty good growth. I consider the soil out there adapted to the raising of fruit.

Q. Here is a picture. Is that a picture of the place you formerly owned, showing fruit-trees and other ornamental trees? A. Yes.

(Whereupon said picture was received and marked Defendant's Exhibit 9.)

Cross-examination.

My experience in fruit raising consists of attending to fifty trees that I planted on the first place out there, for a period over a year, and the twelve trees that I now have, and what I have observed. I have never sold any fruit. I never saw a fruit man that comes out there to the district selling fruit. I don't know a Mr. David.

TESTIMONY OF LOUIE TURKELSON, FOR DEFENDANT.

LOUIE TURKELSON, a witness for defendant, testified:

I live in Rio Linda on the highway, this side of the town site of Rio Linda. I have forty acres. I bought fifteen years ago and have been living there ever since. Before I came to Rio Linda I was engaged in the fruit business in Southern California. I have lived in California for something around thirty-five years. I was not an eastern purchaser. A good portion of my property is planted to fruit-trees. I have a commercial orchard. I have been in the fruit business ever since I came here. I do not raise poultry. In my orchard I have about three and one-half acres of Bartlett pears. [73] Some of those trees are planted on soil that is as shallow as three and three and a half feet. The trees on that soil are about thirteen years old. They are still alive and in healthy condition. I have had good pear crops; the quality and size of the fruit is A–1; it grades up in the market good. This year it was a medium crop, on account of the weather in the blooming season, it rained, and the bees could not pollenize, and the crop was very light. I had a very heavy crop two years ago. Two years ago I sold about seven hundred boxes, and there were over three hundred boxes left on the trees, because the packing-houses closed down and we could not dispose of them. That was due to

(Testimony of Louie Turkelson.)

marketing conditions. I sold about 208 boxes this year, and about a third of them were left on the trees. That, too, was due to marketing conditions; the market was glutted.

The soil where I am located is adapted to the commercial raising of pears and other fruit. I have about twenty-five acres of almonds, and the almond trees are planted on soil as shallow as three or three and a half feet. The trees on that shallow soil are still alive. I have not had any great loss of trees planted on that shallow soil, due to the soil depth. The trees have borne real good. They are about thirteen or fourteen years old. They are good, strong trees. I could not tell just what the tonnage of the crop was from the almond trees; some years are heavier just like in anything else; in the farming proposition some years you get heavy crops, and some years light crops. It depends on the season. My crops average up in comparison with the production of almonds in other parts of the country. I consider the soil where my almond orchard is adapted to the commercial raising of fruit.

I know the Unsworth place; have seen the orchard since it was planted. That ground was blasted in the center of the tree rows. [74] There is ample drainage provided where the ground is blasted. I consider the soil where Mr. Unsworth's orchard is located on the blasted ground, adapted to the commercial raising of fruit.

(Witness is shown picture.)

(Testimony of Louie Turkelson.)

That is a picture of my almond orchard. The reason the trees have so few leaves on them is because in the fall when we harvest the almond crop we knock them down with long poles into sheets, and when we knock the almonds down the leaves come down with them.

In the proper season, the trees are in full leafage, and are good, strong-looking trees.

(Whereupon the said picture was received and marked Defendant's Exhibit 10.)

Cross-examination.

I think the depth of the soil on the Unsworth place is about the same as on mine. I think the shallowest place on the Unsworth place is not quite three feet. My best estimate of the average depth of my soil would be five feet. If you blast, and if you get the right man who is willing to work it, soil of an average depth of 19 inches over hard-pan is adaptable to the raising of deciduous fruits. You have to blow through the surface hard-pan and hard soil, it is kind of hard underneath. That generally lets the water down. I have not had any experience in blasting on my own place but I have seen it done on Mr. Unsworth's place and Mr. Fisher's place, and places around the community.

Q. Would you consider soil on an average depth of 19 inches especially adapted to the raising of deciduous fruit? I would like to have you answer that question "Yes" or "No."

A. It is pretty hard to answer it in one word. It

(Testimony of Louie Turkelson.)

depends on the man, as I said before, and if you blast. [75]

Redirect Examination.

As far as the soil, itself, is concerned, it will produce.

TESTIMONY OF JAMES GEDDES, FOR DEFENDANT.

JAMES GEDDES, a witness for defendant, tesfiled:

I have lived in Sacramento for thirty-five years. I am familiar with the farming situation around Sacramento and the suburban subdivisions, and with the land situation in general. I have bought and sold lands in Sacramento County and in the Sacramento Valley. I have also been engaged in the fruit business in Yolo County, both as a grower and as a buyer, for a great many years, for the canners. I bought fruit for the canners around in the different orchards. I have bought land in the Rio Linda Colony. I have owned land there and sold it. I know the parcel of property involved in this litigation.

I am well acquainted with the tract of land to the north of the city, known as the Haggin Grant. I knew that when it was under the control of the J. B. Haggin interests, and I have known it from the time it was sold by the Rancho Del Paso Company and subdivided and cut up. I have also known the Rio Linda subdivision from the time

(Testimony of James Geddes.)

that it was carved out from the larger tract, and I have watched the development out there. The reasonable market value of the Hanson property, as of the 1st day of September, 1921, was about $350 an acre.

I am pretty well acquainted with the soil conditions throughout the Rio Linda Colony, as well as on the Haggin Grant, generally. I know of the existence of hard-pan all through that area, and throughout Sacramento County. I have seen the fruit growing districts in Sacramento County on hard-pan lands. If the plaintiffs' land, lot 22, of Subdivision 5, were properly planted [76] and properly handled it would produce fruit. There is plenty of evidence of it all around there. It would produce fruit in commercial quantities.

Cross-examination.

It would be hard to produce fruit commercially on such a small acreage. Most of the places are five or ten acres. There are three places right in the immediate vicinity of this place, the Melin place, the Cottrell place, and the Reese place, that are about as three nice looking young places as you will see in the state, no matter where you go. Some of those trees would be anywhere from six to eight years old; some of them would be three or four years old. I am basing my idea on the vigor and the health of the trees, and their fine appearance. I do not know the production of fruit there. I have seen the fruit on the trees, which is very good.

(Testimony of James Geddes.)

I buy property a good deal for individuals and for corporations. Sometimes I buy property for myself. I have probably bought $75,000 or $100,000 of property at different times in the last eight or ten years. A great deal of that property being in Sacramento County. Some of the properties have been conveyed to me, probably half of them. I bought property from 1914 to 1925; one or two pieces were not recorded, they were held in my name in escrow. I cannot answer offhand what property was conveyed to me between the years 1914 and 1925, the conveyance of which was recorded in the County Recorder's office of this county. That is a matter of record. If it is not of record, that settles it; if it is of record it also settles it the other way.

TESTIMONY OF E. E. AMBLAD, FOR DEFENDANT.

E. E. AMBLAD, a witness for defendant, testified:

In the month of September, 1921, I was the sales manager of [77] the Sacramento Suburban Fruit Lands Company, with my office and headquarters in Minneapolis. I was the representative of the company who dealt with Mr. J. H. Hanson, in negotiating the sale of land. It would be hard to estimate the number of meetings had with Mr. Hanson prior to the time that he signed the contract. I guess he was in my office a dozen times. I never met him at his home. He intended

(Testimony of E. E. Amblad.)

going into the poultry business. We discussed poultry very completely. We had a model of a Lyding poultry-house in our office which was exhibited to Mr. Hanson and explained to him. We looked through it a number of times. It is known as the Lyding system of operating in the poultry business, as conducted here at Rio Linda. It illustrates the various appliances for labor saving, such as the feeding system, and the general plan of conducting the poultry business.

We did not maintain in our office a model of a ten-acre commercial orchard. There was no discussion regarding the commercial orchard business in Rio Linda. The only cost or discussion of an orchard was in connection with the family orchard around his house, a few trees for family use. We never went into a discussion of a family orchard, or any orchard, on the basis of commercial profit. I did not discuss with him or propose to him the putting in of poultry for an immediate income with the plant to be scrapped when the fruit orchard came into bearing. The main talk was with regard to the poultry businesss as a course of immediate income. Mr. Hanson and a number of other employees of the Ford plant, were intending to come out here together, and later on these other men came in, and between them all, they were discussing going into the poultry business in a general way. That was a conversation with the entire group.

I described the soil in a general way to Mr. Han-

(Testimony of E. E. Amblad.)

son. I told him about the hard-pan that underlies this district, in fact, I had a [78] sample of it on my desk that I showed him, similar stuff as has been exhibited here, and that it crumpled up. It was used in the office right along, to exhibit the nature of the hard-pan. I told him he would have to consult our horticultural adviser, Mr. McNaughton, and that Mr. McNaughton would explain to him what was necessary about the particular lot that he might select when he came out here, in the way of blasting, etc. That discussion was had before he signed his contract.

Cross-examination.

I am at present in the life insurance business, employed by the Mutual Life Insurance Company of New York City, in Minneapolis. I left the employ of the defendant corporation several months ago. I was never in the employ of the Rio Linda Poultry Farms, Inc., and know nothing about that concern. I have never had any dealings with it and have had nothing to do with it.

I told Mr. Hanson that the district, in general, was adapted to the growing of the various fruits, such as described in the booklet that he had. I told him that the character of the soil would vary; that one part of the district would be deeper soil, and possibly different drainage; that over an area of eight miles it varied, and that he would discover those differences when he came out to select his land. He selected a piece of land on which he made

(Testimony of E. E. Amblad.)

a payment back in Minnesota, but he had the right to exchange when he came out here. He had never seen the lot he then selected. I did not tell him that it was the choicest lot in the district. I did not say that we had a very choice lot there for his consideration, that we had picked out for him. We had several lots in the office that the horticultural adviser would recommend as good lots to sell off the map to anybody wanting to buy them. This was one of the lots. [79] I told him that it was a good average lot, such as we would recommend selling off the map. I did not tell him that the soil was nineteen inches in depth, as an average, over the lot. I did not say that this land was not especially adapted to the raising of deciduous fruits, the land that he was buying. I told him that poultry was the principal thing that all the people in the district were going into. We did not talk about orcharding commercially. Later on if he wanted to develop the balance of the tract, after the establishment of a poultry business, and put it into any kind of fruit, he might have an acre, or two or three acres, and he could do like many others were planning to do.

The number of acres of land that he would be using in connection with his poultry business would depend on how his capital would allow him to go into the business. To begin with, he was just going into the poultry business on a slight scale, and as he got his money from these other properties he would go into it on a larger scale, and he would use

(Testimony of E. E. Amblad.)

the balance of his land. He would not necessarily have to use the entire ten-acre tract for poultry. He might want to plant an acre or two in fruit. Five or ten acres would be consumed as an average in the poultry business; the plans are to cover the whole ten acres. I absolutely did not calculate on about eight acres being used in a commercial orchard business on this particular tract of land.

Redirect Examination.

I showed Mr. Hanson our price list, which as of that time, was $275. The custom of the company was, that the directors would get out a price all through the colony every so often, and the next advance was to be probably a twenty-five dollar advance. That advance was to come late in the fall, about November. The rise in price was made. I did not tell him that the land was worth more than we were [80] asking for it.

Recross-examination.

I did not tell him that it had increased in value since the price was fixed at $275. I told him our next price list was to be issued about November 1st, and the price then would be three hundred dollars an acre. The company had established price lists which we had to operate by, and we could not vary from them.

I showed Mr. Hanson the price list. That varied in different districts, some place $250, some places $275. We have various prices, according to locality. We did not discuss whether the land was worth $275.

TESTIMONY OF ARTHUR MORLEY, FOR DEFENDANT.

ARTHUR MORLEY, a witness for the defendant, testified:

I live in what is known as the Arcade district, about a mile south of the south line of Rio Linda. My place is southeast of the Sacramento City Park, the Del Paso Park; south of the Auburn Boulevard. I have lived out there about eight years. I have about seventeen acres and have owned it about eight years. It is all planted to fruit-trees. Most of it has been planted about ten years. Nearly all of it was planted when I purchased it. The general acreage depth of soil on my place is about a foot and a half to three feet. The ground was blasted where the trees were planted. Where the ground is blasted there is sufficient drainage provided for the trees. The character and quality of the hard-pan there is about the same as that in the Rio Linda district. I have seen that hard-pan and substratum underneath the hard-pan thrown out onto the ground by blasting. It disintegrates and becomes soil after being exposed to the air and the elements; it is nearly all gone within a year, except possibly the very top layer of about an inch thick; usually that takes [81] a little longer to break up. When that hard material or substratum breaks up it will grow plant life and fruit-trees. There is nothing whatever that is detrimental to the growth of fruit in it. I think it is

(Testimony of Arthur Morley.)

equally as good as the top soil. Things grow nice and get on nice in it when it is planted. My trees, in that character of soil, in blasted holes, have made a very satisfactory growth. Generally speaking, my orchard is in a good, healthy condition. I ship, usually, about one thousand crates of plums. That is off of about six acres. Then I have pears, a few apricots, and some cherries and peaches. The plums usually run about seventy or eighty crates to the ton; about twenty-five pounds to the crate. I usually ship about one thousand crates. The quality of the fruit is No. 1. It goes under the Blue Anchor Brand, of the California Fruit Exchange, which is the highest quality that they ship. I have had about seventeen or eighteen years' experience in the fruit growing business. During that time I have had experience in the growing of fruit on river bottom lands, on uplands, all over. The majority of plums, peaches, and apricots, and that variety of fruit are all grown on the uplands. That is, the shipping varieties from here, and up through Carmichael, Fair Oaks, El Dorado County, Placer County, Newcastle, Penryn, Auburn, and up through there. That land is all granite formation, and very shallow soil, lots of it. You find very few olives, almonds and apricots and those kinds of fruit on the river bottoms; they practically all grow on the uplands. The presence of hard-pan, or the shallowness of the soil above the hard-pan is not a detriment to the raising of fruit.

I have looked after the work of pruning and the

(Testimony of Arthur Morley.)

picking of crops in season on places other than my own. I find all the orchards have been blasted for. Some of those orchards include: George Filcher has twenty acres; Mr. Fletcher has twenty acres; Mr. Wanzer has [82] thirty acres; Mr. Missble has ten acres; O. G. Hopkins has probably twenty acres. Dr. June B. Harris has an orchard and Owre Brothers have quite an orchard of peaches and almonds. All of those orchards are on the uplands and on hard-pan land of shallow soil, blasted. Generally speaking where those orchards have been cared for, their growth has been very good and they have good crops every year. As to the almonds, they had half a ton to the acre on some orchards, which is a good crop. On Mr. Hopkins' place, according to my estimate, I should think the six year old prunes would go about a ton, dried, to the acre, and he has about ten or twelve acres. For that age of tree, that is very good production.

The trees in the Dr. Harris peach orchard were heavily laden; they had a good crop. They were breaking down from the load. The market for the peaches was poor but the production was good.

I have been all through the Rio Linda district. For a period of about thirty days, I was specially employed by the Sacramento Suburban Fruit Lands Company to make a general agricultural survey of that district. In doing so, I observed the soil, the depth, and the quality, and the character. It is very similar in type to the soil on my side of the ranch, and of a similar depth. Just about the

(Testimony of Arthur Morley.)

same hard-pan conditions are prevalent. I think the soil in Rio Linda is as good as ours. I think you can raise fruit there as well as you can on our land, and I know that fruit is raised successfully, commercially and profitably on our land.

I made a count of the number of trees and vines that are now growing in the Rio Linda district. The results were as follows: Almonds, 18,720; olives, 9,370; peaches, 7,060; plums, 2,950; pears, 8,875; prunes, 6,040; figs 10,230; apricots, 1,550; Walnuts, 490; cherries, 9,465; apples, 600; persimmons, 100. That is outside of the family orchards. We estimated about twenty-five trees to the family orchard, three hundred and twenty-five orchards; that would make 8,100 trees. [83] The total number of trees that I found growing in the Rio Linda Colony came to 91,750, and the total number of vines would be 100,900. The trees and vines respond to care. Those that have been taken care of were producing good crops, and the trees look very good. Others had been neglected and of course the trees were not doing so well. Pruning, irrigating, cultivating, all have to be done in the right time, and properly, and if done on that type of soil, the orchard will respond. That type of care will pay. Where given this proper care the trees will produce good crops commercially, which if the market was normal, would be profitable.

I made some investigation to determine whether or not root growth would penetrate into hard-pan where blasted alongside of one plum tree and three

(Testimony of Arthur Morley.)

olive trees. We dug down about four feet, and we found that the roots were extended through the subsoil underneath through the hard-pan. That was the case with the plum tree, as well as with the olive trees.

(Witness is shown pictures.)

Those are pictures taken of the excavation by the side of the olive tree; the roots were not especially posed for the purpose of taking the pictures, we found them just that way. The pictures represented the situation absolutely as we found it.

(Whereupon the said pictures were received in evidence and marked Defendant's Exhibit 11.)

Cross-examination.

For certain varieties of fruit I think the hard-pan uplands are as good as river bottom lands. I did not particularly have that idea in mind when I went out to Rio Linda to make the survey. I first formed that idea when I bought my place, eight years ago, but I did not have it in mind in making the examinations in Rio Linda. I was employed by the Sacramento Suburban Fruit Lands Company to go [84] out there and make a survey of the fruit-trees; that was about a month or six weeks ago. Mr. O. W. Jarvis, who was formerly farm adviser here, and is an agricultural expert, was also employed by the defendant company to accompany me on the investigating tour. I went as a practical farmer. Mr. Jarvis was with me during all of the investigating. We counted

(Testimony of Arthur Morley.)

all the trees in the district. The biggest majority of them were thriving and productive down in the creek bottoms, and where the soil was deep; some of the creek bottoms and some of the deep lands over where Mr. Unsworth and Mr. Turkelson are. On the highlands we found that some trees had been neglected and there were some very nice orchards up there. Generally speaking, you can tell whether the trees that have been neglected were doing well before the owner started to neglect them.

We have some pictures taken out there of an olive orchard. I don't know who picked out the olive orchard. Mr. Jarvis said that was where we were going and I went with him, but I don't know whether he picked it out or not. We did not choose an olive orchard because we knew that olive roots would penetrate places that other roots would not; that was not the reason. It is not true that olive roots are very fibrous and will go into crevices and cracks that other roots will not.

We did not find out what the yield of that orchard had been. I don't know whether the orchard had been paying. Olive trees live for hundreds of years, but at ten years an olive tree should be in bearing. The crop on these trees was small this year; it was all over the Sacramento district; no more in the Rio Linda district than anywhere else. I think the orchard was owned by a Mr. Smith; he was not there; the place showed lack of care. [85]

In addition to my own seventeen acres, I super-

(Testimony of Arthur Morley.)

intend the picking of the crops and the pruning of about ninety acres of other property. One of those places is the Wanzer place. I don't know the soil depth on that property. I know it was all blasted, and I know there is a lot of shallow soil there.

I have referred to the O. G. Hopkins place, and I know that Mr. Hopkins is a lawyer. I do not know that he has never made any money off his place. I know he has nice crops. I heard him testify and I heard him say that his place was profitable because of the exercise that he had gotten out of it; I also know that he has produced profitable crops there. I could not say that he has not made any money out of it; I know it is a valuable property now. I have not investigated any of these places as to whether they made money off them. We just look after the crop. I could not tell you anything about whether Mr. Holmes just broke even on his place. All I know about that is from what I heard him testify.

TESTIMONY OF F. E. TWINING, FOR DEFENDANT.

F. E. TWINING, a witness for defendant, testified:

I live in Fresno. I am an agricultural chemist and have been engaged in agricultural work for twenty-eight years. I have a laboratory for my experimental work at Fresno. In the course of the practice of my profession, during the last

(Testimony of F. E. Twining.)

twenty-eight years I have made a pretty general examination and investigation and analyses of the soils and soil conditions up and down through the San Joaquin and Sacramento valleys. I am familiar with them pretty generally throughout that entire district. There are thousands of acres in the Fresno district that are underlaid with hard-pan, and where the soil is of shallow depth. Tree fruits are being raised upon those shallow lands, with hard-pan underlaying them, in the Fresno district. [86] A great variety of fruit is being raised on that type of land; oranges, figs, olives, principally, peaches and, of course, grapes. There the lands are very shallow, within two and a half feet of the surface, they are generally blasted.

I am acquainted with the Rio Linda section and the hard-pan out there. There is considerable soil in the Fresno area that is the same type of soil. There is some in which the hard-pan is more dense than that in the Rio Linda district, where there is a harder hard-pan. Fresno is noted as a very large grape-growing district. There is an immense production of both raisin and table grapes there, thousands of acres. I have seen very good vineyards on a foot and a half and two and a half feet of soil. I have known vineyards on two and a half feet over twenty-five years of age and producing in quantities. As a general thing the ground is not blasted for the vineyards. On the heavy hard-pan lands are the best flavored and earliest maturing grapes, as a rule.

(Testimony of F. E. Twining.)

I know of no rule among horticulturists or fruit growers requiring a minimum of five feet of soil necessary to the successful growing of fruit-trees. Trees will grow on less than five feet of soil; will live, and produce commercially.

I am familiar with the fig district between Madera and Fresno, the Faulkner fig orchards. The soil throughout that orchard is all underlaid with hard-pan. The soil depth runs from the surface down to a few feet, and most of it is on shallow depth. Practically all of those fig trees are blasted for. The blasting provides ample drainage. The trees have lived, thrived, grown and produced in that shallow hard-pan soil, blasted.

I am familiar also with the Florin grape growing district. That, too, is hard-pan shallow land. The earliest maturing, the best quality and flavor grapes in the Sacramento or San Joaquin valleys [87] come from Florin. The soil is exceedingly shallow and hard-pan.

I am familiar with the fruit growing district around Oroville. There is shallow hard-pan land there. They raise fruit there. The Oroville olive and orange crops are the best in the State, and early in maturity. Those olives and oranges are grown on hard-pan lands, shallow, depth and blasted.

I know of some very fine peach orchards in Sutter County on shallow land. I am not so sure about its being blasted, but it is on hard-pan land,

(Testimony of F. E. Twining.)

and some of it must be blasted. In my opinion, considering these various districts that have been spoken of, fruit can be grown commercially and successfully on shallow hard-pan land.

I am familiar with the Rio Linda district; have made between three and four hundred borings out there, generally all over the district. I have also made some chemical tests of the soil in that district. I took some samples and made some chemical analysis of the soil of the plaintiffs in this case. My findings as to phosphoric acid and potash were: Phosphoric acid, total, .17, or 6,800 pounds per acre-foot. Potash, .75, or 30,000 pounds per acre-foot. From twenty-five to fifty pounds of phosphoric acid and from fifty to one hundred pounds of potash is used by a crop of fruit from an acre in a year's time. There is a sufficient quantity of phosphoric acid and potash in that soil to last for quite a number of years. I used in finding those results, the method determining the total amount present in the soil, known as the fusion method, the only method that is recognized. It is one of the tentative methods published in the proceedings and book of official methods of the American Association of Agricultural Chemists. Some chemists use the method of making a soil solution by acid, but it has no official standing, at all, and is not recognized by any of the recent works on [88] chemical analysis. That method was discarded by the American Association of Agricultural Chemists about twenty-five years ago. There is no stand-

(Testimony of F. E. Twining.)

ard relation between the available chemical content and the total chemical content in soils. There has been no method of determining exactly what amount of it was available, that is, of potash or phosphoric acid in a soil; therefore, we determine the entire amount. We have certain methods of determining to see the amount of water soluble for certain purposes. The most you could determine by the other method is simply to say how much is water soluble and how much is acid soluble, and the only safe method of determination is to determine the total.

I would say, in my opinion, that the Hanson property is adapted to the commercial raising of fruit. I have a sample of the hard-pan taken from this property. I find the thickness of the hard-pan structure varies. It stratifies. The thickness of the first hard-pan, that is, the red, will vary from a fraction of an inch to two or three inches. The red sample is the top layer or the hard-pan area. It will absorb water. The top is impervious and must be broken up, but the main bulk of the hard-pan will absorb water. The water will stand on top of the impervious part. Only a very small amount, a fraction of an inch, is impervious to water. Underneath that it is a lighter color, from a light red to a grey, and it is much softer. It breaks up very easily. If the top layer of the hard-pan is shattered by blasting, this sub-layer will absorb water, and will permit sufficient absorption to provide drainage for a tree or plant planted

(Testimony of F. E. Twining.)

in it. It will also retain that moisture to provide moisture back for the plant. If broken by blasting and wet it will stay broken, and not re-cement itself. If it is thrown out on the ground and exposed to the air and the elements, it will then disintegrate; most of it over one winter, after a wet season. [89] After disintegrating there is nothing in this material that is detrimental to plant life. It contains elements the same as the top soil.

Q. I want to show you these two samples that have been brought in by Mr. Davis as samples of hard-pan taken from that property. Will you examine them and tell me what you can about them in comparison with the sample that you brought?

A. This is some of the first hard-pan, the hardest.

Q. That is the top layer? A. Yes.

Q. And that streak that you see on top, there, is that the impervious portion? A. Yes.

Q. Now, examine this. Is that still a part of the top layer? A. This is probably under that.

Q. You are familiar with this material such as I have just shown you, the lighter color material?

A. Yes.

Q. Will it distintegrate? A. Yes.

Q. Will it form soil and support plant life?

A. Yes.

Mr. BUTLER.—These two samples brought in by Mr. Twining are now offered in evidence.

(Testimony of F. E. Twining.)

(Whereupon the same were received and marked Defendant's Exhibit 12.)

Cross-examination.

I was never connected with the Faulkner Orchard Company, nor [90] ever employed by it. That was a subdivision north of Fresno, and sold principally to Fresno people. I would not term it a colonization scheme.

We made an alkali survey of some of the lands of the United States Farm Lands Company. I suppose that was a colonization scheme.

The acid soluble method is not actually recognized; it is used by some chemists as a short method. All of the principal recent works on chemical analysis only give the official method.

I don't know Edwin G. Mahan; I know who he is. If I am not mistaken, he wrote a short text-book. I could not say if he is a professor of analytical chemistry at Purdue University. I do not know anyone by the name of Ralph H. Carr. Those are names of small text-book writers, probably, written for school purposes. One of the principal methods used by the principal laboratories, is Scott's methods. I would not say that it is the only one used. There are dozens of different text-books. Mahan is a good teacher.

Q. I will show you the book, Mr. Twining, entitled "Quantitative Chemical Analysis," by the two gentlemen mentioned, 1923, Copyrighted.

This is a second impression made in 1923. I

(Testimony of F. E. Twining.)

imagine they simply gave some short methods in it. It is not a book that is used generally. I would not question that it is an authorative book.

Q. This says that chemical methods for studying the soil may be considered under the following heads: (a) Complete analysis; (b) potential plant food; (c) available plant food. Those are the three heads, are they not?

A. Those are the three heads in there. We know that the potential plant food may be all that is present.

Q. You would not agree with that statement, would you? A. No, I would not. [91]

Q. You would overrule it?

A. We are talking now of phosphoric acid and potash. Of course, those two we would not call a complete soil analysis. When they speak of potential plant food they may mean only those particular elements present in the soil which are plant foods.

Q. I will ask you if this statement is correct: "This is separated by digesting the soil in hydrochloric acid at a constant boiling point, specific gravity 1.115, containing about 23 per cent of hydrochloric acid, using the ratio of one part of soil to ten of acid, thus affecting the solution or partial decomposition of soil minerals. This was formerly the official method." Is that a correct statement?

A. Formerly the official method.

(Testimony of F. E. Twining.)

Q. Answer my question: Is that a correct statement? A. That statement is correct.

Q. And that is the method of determining the potential plant food: Is that true?

A. No, sir.

Q. Is there any other method? A. Yes.

Q. What?

A. If I were to take a soil and make a test of it to ascertain the potential plant food, I would use a basic method.

Q. And that would bring out all of the plant food that was in rocks and gravel, and sand, and everything else, wouldn't it, which the plant could not reach? A. No.

Q. You are talking about some method other than the one you used, are you not—that is what you are talking about now, isn't it? [92]

A. Yes.

Q. What is that method?

A. It is a long and intricate method of taking the various combinations of elements in the soil; for instance, a particular soil like this is deficient in lime; we would make a solution containing lime, and see how much potash, phosphoric acid, or whatever it might be, would be displaced by that method; in other words, would become available to the plant.

WITNESS.—I would not say it surely was, but I don't think the method just read was included in Scott's work. I would not swear that it was not.

I cannot name other authorities on quantitative analysis that this method has been left out of in

(Testimony of F. E. Twining.)

recent years, but I can bring you at least a dozen books, all of them authorities, and the very latest publications, which do not mention the plant food potential, analysis. Very few of them will mention the potential plant food analysis. I don't think that Scott mentions it; I don't think that Griffin mentions it. I don't think you will find it mentioned in the recent works of Lunny, or Lemmerman, or any of those works.

The tests on this soil were made by me, I think, nearly a year ago. I took the samples off the land myself. I think Mr. McNaughton was with me on that trip; I would not say for sure.

I was by the Hanson property not very long ago; there is a house that I think faces east; there is quite a lawn, or an alfalfa patch, or something in front of it.

If it is blasted and properly broken up, so that drainage is provided, the land out there would be adapted to fruit raising. [93]

TESTIMONY OF IDA E. PERRA, FOR PLAINTIFFS (IN REBUTTAL).

IDA E. PERRA, called for the plaintiffs in rebuttal, testified:

I live out in Rio Linda. I know Lambert Hagel. I remember being over at the Kral house in November, 1927, when Mr. and Mrs. Kral were present, Mr. and Mrs. Klein were there, and my husband and I. I had a conversation with Lambert Hagel at that time, and he told me that the Rio

(Testimony of Ida E. Perra.)

Linda land was too shallow for tree fruit raising. He said that it was foolish to plant trees there and expect them to grow. He also told me that he used his grapes to make wine.

Cross-examination.

My husband and I were plaintiffs in a lawsuit of the same kind as is being tried to-day; our case has been tried. We are contributing to a fund maintaining these actions generally.

TESTIMONY OF JOHN V. KRAL, FOR PLAINTIFFS (IN REBUTTAL).

JOHN V. KRAL, called for plaintiffs, in rebuttal, testified:

I live out near Mr. Hagel. I remember having a conversation with him in December, 1927, about what I should plant on my land. He at that time told me that it was useless to plant fruit-trees there. He said that fruit-trees would not grow on that shallow hard-pan. He also said that he did not buy from the company, but that all those that did buy from the company had been cheated.

Cross-examination.

Mr. Hagel told me at that time that he would not advise me to plant the land to trees, but to plant grapes and they would grow. I was kicking at the price of the land, and he said, "Mr. Kral, don't kick, it's no use, we all know that the company beat us on the land, but the best way for you to do is

(Testimony of John V. Kral.)

to do the same like I did, spend [94] twenty-five or fifty dollars more and plant some ornamental trees and some shrubs and make the front of the place look nice and wait until some easterner comes and buys you out." He said, "I am figuring the same way."

I am a plaintiff in a lawsuit pending in this court of the same kind that is being tried to-day. That conversation was had a short time before I commenced my action. I am also contributing to a fund to maintain these actions generally.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFFS (RECALLED IN REBUTTAL).

HERBERT C. DAVIS, recalled for plaintiffs in rebuttal, testified:

I am familiar with the cost of blasting lands for planting trees in land similar to that in the Rio Linda section. It amounts to sixty to seventy-five cents a hole, and the variety of trees and the number of acres regulates the cost per acre. Generally of deciduous fruit there are eighty to one hundred trees to the acre.

Mr. KELLY.—Q. Did you ever blast anything on the Rio Linda Colony?

A. Not on the Rio Linda proper, just on adjacent lands.

The cause was thereupon argued to the jury. During the course of the argument counsel for the

defendant admitted that defendant by its literature had represented to plaintiffs that the piece of land which they purchased was proven beyond a doubt to be well adapted to the raising of fruit commercially and that this representation had been made for the purpose of inducing plaintiffs to buy the land.

After the argument, the following occurred:

Mr. BUTLER.—Will you permit me to present a motion for a directed verdict?

The COURT.—Yes, but it comes a little late. The record will show the time the motion is made. [95]

Mr. BUTLER.—Yes. I overlooked it. The defendant moves the Court to direct the jury to render a verdict for the defendant on the following grounds:

(1) That the evidence is insufficient to show that defendant deceived or defrauded plaintiffs in the making of the contract referred to in plaintiffs' complaint for the [96] purchase by plaintiffs from defendant of land.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land purchased by plaintiffs from defendant, or the value thereof.

(3) That the evidence is insufficient to show that the plaintiffs have been damaged by any act on the part of defendant.

(4) That the evidence shows affirmatively that plaintiffs' cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof.

of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiffs' cause of action is not barred by said above-quoted provisions of said Section of said Code.

(5) And also that plaintiffs have failed to prove their cause of action.

The COURT.—The record will show the time at which the motion is presented. The Court merely observing that it believes that the evidence is sufficient to call for a determination by the jury, and the motion will be denied.

Mr. BUTLER.—Exception. [97]

Before the Court's charge to the jury, defendant requested the following instructions:

DEFENDANT'S INSTRUCTION No. 1.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiffs must show that the fraud occurred within three years of the commencement of their action for relief, or if their action was commenced more than three years after the fraud occurred, then they must show, in order to maintain their suit, that they did not discover they had been defrauded until a date within three years of the time they commenced their action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiffs will be presumed to have known whatever with reasonable diligence they might have as-

certained concerning the fraud of which they complain.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiffs have proven by a preponderance of the evidence both that they did not discover the alleged fraud within the period of three years before they filed their action, and that they could not have discovered it by the exercise of reasonable diligence, three years before they commenced this suit. They were not permitted to remain inactive after the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them. They are not excused from the making of such discovery even if the plaintiffs in such action remain silent. A claim by the plaintiffs of ignorance at one time of the alleged fraud, and of knowledge at a time within three [98] years of the commencement of their action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiffs contracted with defendant to buy land. Plaintiffs commenced their action on the 28th day of

February, 1928; their contract with the defendant for the purchase of its land was made in November, 1921. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiffs in the making of this contract, then before you can find a verdict in their favor, you must also believe from a preponderance of the evidence that they neither knew of the fraud, nor could, with reasonable diligence, have discovered the fraud before a date three years prior to the commencement of their action, that is, before the 28th day of February, 1925. If you believe from a preponderance of the evidence that plaintiffs either knew of the facts constituting the alleged fraud before February 28th, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant.

DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiffs' discovery of the alleged fraud that if plaintiffs discovered that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the falsity of any material representation concerning the land. [99]

DEFENDANT'S INSTRUCTION No. 3.

You are instructed that plaintiffs cannot recover in this action unless they were deceived by the al-

leged representations, for if the means of knowledge are at hand, equally available to all parties, and the subject of purchase is alike open to their inspection, if the purchasers do not avail themselves of these means and opportunities, they will not be heard to say that they have been deceived, unless they were induced by trick or misrepresentation of defendant not to make such inspection.

DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment or probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation.

DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered the falsity of the alleged representations as to value of the land they bought, more than three years before they commenced their action, then your verdict must be for the defendant. [100]

CHARGE TO THE JURY.

The COURT. (Orally.)—Gentlemen of the Jury: You have heard the evidence and the arguments, and now it is for the Court to deliver to you the

instructions. They are mainly to make you acquainted with the law which applies to this case, and in the light of which you will determine the facts. Remember, you take the law from the Court, but the facts, what witness to believe, what weight to give to the testimony, what inferences to draw from the circumstances, that is entirely your function, and when you have determined the facts by your verdict we take them from you.

This is a civil action. Plaintiff alleges certain matters for a cause of action against the defendant. The defendant denies part of them, the material and vital ones.

In a case of this sort, it is incumbent upon the plaintiff to prove substantially what he alleges, by the greater weight of the evidence, or he is not entitled to recover. I should say "they," because there are two plaintiffs, husband and wife. The defendant is not required to prove that plaintiff has no case. At most, it is privileged to offset the plaintiff's case, so far as it can, and go as far in that direction as it sees fit. If, then, when you come to consider all the evidence together, the greater weight of it is not with the plaintiff, the defendant will be entitled to your verdict. Remember, when I say that the burden is upon the plaintiff, it, after all, means simply this: You take into consideration all the evidence, that in behalf of the plaintiff, and that in behalf of the defendant, as well, and, determ*in*g where the truth is in it all, if you then cannot say that the greater weight of it is with the plaintiff, the defendant is entitled to the

verdict. If the greater weight is with the plaintiffs, they are [101] entitled to the verdict. If there is anything that makes in behalf of the plaintiffs in the defendant's case, you give the plaintiffs the benefit of it; and if there is anything in the plaintiffs' case that makes in behalf of the defendant, you give the defendant the benefit of that.

The first thing to explain to you will be what is meant by the greater weight of the evidence and how you arrive at it. You may conceive the evidence in two scales, all that makes for the benefit of the plaintiffs in one, and all that makes for the benefit of the defendant in the other, and unless the plaintiffs' is the heavier, they are not entitled to recover. If it is left, in your judgment, in equal balance, or if the defendant's is heavier, the plaintiffs would not be entitled to recover, and the defendant would be.

Now, in passing on the credibility of the witnesses who have testified before you, you, of course, see the witnesses before you; you observe their demeanor; you take note of the probable amount of knowledge which they may have in respect to what they testify, and you take note whether they are testifying freely, frankly, fairly, or whether they seem inclined to exaggerate or to avoid direct answers, or to mislead you. The office of a witness is solely to aid you to arrive at the truth; and it is for you to determine how far these various witnesses have fulfilled that office. You take note of the unreasonableness of any witness' testimony, if there is anything unreasonable in it. Reasonable-

ness is a great test of truth. Whether the witness contradicts himself, whether he is contradicted by previous statements made by him elsewhere than in court; if any such have been proven before you, whether he is contradicted by other witnesses whom you prefer to believe, or whether he is contradicted by circumstances—it is an old saying in the law that witnesses may testify falsely and circumstances [102] may point unerringly to the truth. That is undoubtedly so. You may, on occasion, prefer to believe all the circumstances that surround the case, rather than the testimony of some witness that, in your judgment, conflicts with the circumstances, and is unreasonable in light of them.

You take note of the interest of a witness in so far as any appears. Of course, it is very clear that the two plaintiffs have a large interest in this case. You ask yourselves whether other witnesses, for the plaintiffs as well as witnesses for the defendant, have been inspired at all by the manner in which they are aligned, by partisanship, to deviate from the truth in presenting the facts as they represent them to you.

There is a maxim of the law that witnesses are presumed to speak the truth; but you may see instant reason why you will not give them the benefit of such presumption. You might see it in their demeanor, in their manner of testifying, their interest, or anything else that would affect your judgment as to their credibility.

There is also another maxim of the law that if any witness has testified falsely before you in any

particular you have a right to and should distrust all the balance of the testimony of that witness, and, if your judgment approves, you may reject it all, because, if you believe any witness has testified falsely in one particular, if his oath has not held him faithful to the truth in one particular, what confidence can you have that it has in other particulars?

Another rule of law is that one witness is sufficient to prove any fact in issue in this case, provided he is worthy of credit, in your judgment, and you give him credit accordingly. You may believe one witness in preference to several on either side. The number of witnesses is not vital. That is very obvious. There [103] may be occasions when you would prefer to believe one to several. But if you believe that witnesses have equal opportunity to know what they are talking about, and equal recollection of the facts, and equal honesty and accuracy in reporting them to you, then, of course, the number of witnesses might well weigh heavier than a single witness.

You are not obliged to believe that anything is so simply because some witness swears it is so. That is obvious. My predecessor in Montana, Judge Knowles, used to illustrate that to the jury—it might not be quite as striking in the case here, but he would say this: "You are not obliged, Gentlemen of the Jury, to believe a thing is so simply because some witness swears it is so. A witness may take the stand and swear most solemnly that down the street he saw an elephant climbing a telegraph

pole; you are not obliged to believe that, even though he offers to take you down and show you the pole."

Now, of course, I don't say there is anything like that in this case, and I simply mention that to you by way of illustration. It is for you to weigh and determine what witness speaks the truth, and how far, and your determination is final. The same method by which you determine the truthfulness of men with whom you deal in daily life, just by that same method you determine the truthfulness of the witnesses here. The processes of reasoning and of judgment which animate you in your business are not changed because you are in the jury-box. Whenever you have determined where lies the greater weight of the evidence, or, rather, unless you determine that the greater weight of the evidence is with the plaintiffs, they are not entitled to a verdict, but the defendants are.

Now, as to what the plaintiffs allege. They allege, in substance, and the case has been tried on that theory, taking the [104] opening statements, and the course of the evidence, and the final arguments of counsel—the plaintiffs complain that the defendant, in selling them this land, represented to them that it was well adapted to commercial orcharding. That is a shorthand rendition of the allegations charged. They also charge that it was represented to them that the land was worth $275 an acre, that is, it was worth $275 an acre or more. Those, or either of them, one of them, at least, must be maintained by the greater weight of all the evidence,

considered by you, or plaintiffs would not be entitled to a verdict.

Defendant denies that those representations were made, or, rather, I think counsel in his final argument did admit that the representation as to the adaptability of the land for commercial orcharding was made, because it was in the book. He was fair and frank with you to that extent.

The first rule of law is that the representations must be proved before you by the greater weight of the evidence. That is for you to determine. First: The representation that the land was well adapted to commercial orcharding, that is clearly in the book, there is no dispute about that. Counsel, in his final argument for the defense, admitted that before you. But, aside from its being in the book, Mr. Hanson testified that Mr. Amblad, the agent of the defendant, made the same representation to him down in Minnesota, when he was selling him the land. And the witness Amblad denied it. It is for you to determine where the truth lies in that respect. Which one is most probably telling the truth before you, the plaintiff, who says that Amblad told him the land was worth $275 an acre, and was going up, and was really worth more? Is that to be taken as true? Or is Amblad's denial to be taken as true? Unless you find it is proven before you by the greater weight of the evidence—and the only evidence is the plaintiffs' [105] statement of it, except what you may gather from the commendation of the lands in the defendant's book—you would find for the defendant, unless you

find that proven by the greater weight of the evidence.

Then, if the representations were made, and that in respect to the land being adapted to commercial orcharding was made, the next rule of law is that it must appear by the greater weight of the evidence in the case that those representations, or at least one of them, was false. That is the big question in the case for you, Gentlemen of the Jury. Were those representations, or either of them, false? In asking yourself that, you take into consideration all the evidence that both parties presented, remembering that they must be proven false by the greater weight of the evidence, or the plaintiffs are not entitled to recover.

Now, as to the adaptability of the land. Plaintiffs present their witnesses, several buyers from the defendant on these Rio Linda lands. They lie right out here some ten or twelve miles from the city. They testify they tried to grow trees. They tell you that for the first year or two they did very well, and then that they began to show lack of thrift, and died. They impute it to shallowness of soil. Eighteen inches—less than that. I think the plaintiffs' land, itself, is shown to be by the testimony about nineteen inches in depth, if I remember Mr. Davis' testimony. On some it was less, and on some it was more. They all agree that the general character of the land, the depth of the soil and the hard-pan is practically uniform, save and except that in places there will be variations through local causes of considerable consequence. These wit-

nesses tell you that their trees died. They stated that they gave their trees proper care. They impute it to the shallowness of the soil. [106]

The plaintiff then presents Mr. Davis, who comes before you as an expert, the same as the defendant has its expert, Mr. Twining.

An expert is one who represents himself as having special knowledge upon a subject which is not open to ordinary observation, and requires study and experiment; then they come and testify to you, and they even express opinions.

The rule in reference to experts is like that in reference to other witnesses. You are not obliged to believe it is so simply because they swear it is so; you are not obliged to accept their opinions. In so far as you believe they have the necessary learning and knowledge, and have honestly reported to you, you give them respect and credit that far, and no further.

Now, what do we find here about the experts? We find the experts differing very much. Mr. Davis says the soil is an average of nineteen inches on plaintiffs' land, and it lacks the necessary food elements vital to any vegetation, and particularly for fruit—potash and phosphoric acid. He told you the amount he found on his analysis. He told you that his learning is, taught in the University of California, and by authorities, that five feet of soil is necessary for a successful orcharding enterprise.

You will remember, the question here is not whether the land will grow trees, whether the land will produce fruit; but the question here is whether

it will grow them and produce fruit to that extent that it will make a successful commercial enterprise. A commercial orchard may be taken to be one that, with reasonable care and labor, will produce such reasonable crops for such a period of time that, at reasonable markets, the whole enterprise, throughout its career, will have returned a profit. That is the same with any business. Any business must liquidate the overhead. The orchard [107] will not come into bearing, so the book says, before five to ten years. That is perfectly obvious; we all know that. So there is the expense up to that time. The orchard must not only grow trees and grow fruit, but it must grow the fruit long enough to pay the expense of getting it up to the point of bearing, and it must pay interest, and it must pay taxes, and make a return that will represent a profit over its life.

Mr. Davis says this land will not do it, the soil is too shallow, it has not sufficient depth to furnish the plant food, to afford drainage, and to conserve moisture.

Mr. Davis says the hard-pan, being impervious to water, is too deep to blast through it. Blasting the hard-pan on this land, eighteen feet deep, will only make a pothole, he says, which will not afford drainage, and that water will collect therein and drown the roots of the trees, and the trees will die.

He tells you that in his practical experience at Antelope, adjoining this land, seven years in a large orchard, some 150 acres, he managed them, owned them, and he proved it there. It is true he was

taught otherwise in school. But hope springs eternal; youth is optimistic. Mr. Davis went out and experimented to see if he could not overcome what he was taught in school. He is wiser now. He paid some $47,000, according to his statement, in seven years, to prove that it was a failure on this land adjoining Rio Linda, land three to four feet deep, and underlaid with hard-pan.

Mr. Davis states to you his opinion that these lands are not adapted to successful orcharding.

Now, the defendant resists that case. It presents witnesses who also live out in the Rio Linda lands. They tell you the time they have been there, what trees they have grown, how well they have done, what returns they have received, and express the [108] opinion that it is adapted to commercial orcharding. Some have been present and have grown trees for quite awhile. Mr. Turkelson, for one. It does develop that Mr. Turkelson's land averages five feet, some of it less, and some of it deeper, to make up the average. They have told you the amounts they raise for such time as they have mentioned to you. It will be for you to determine whether that indicates evidence of commercial orcharding, or not.

Mr. Morley has an orchard in Arcade, and knows about other orchards. He tells you about his trees, and about his crop this year and last year. Mr. Morley told you how much he got for a year or two. He did not say how much it cost him to raise those crops. His evidence is before you in general terms, to be given such weight as you think it is entitled to.

Mr. Twining testified as an expert for the defendant. He tells you that he knows of orchards on hard-pan land generally like this, shallow soil, in Fresno, Merced, Oroville, and elsewhere, and that when the soil is prepared by blasting, that then it will be adapted to successful orcharding. He says that to blast the hard-pan opens it up and the roots can penetrate. Evidently, shallow soil is not enough for successful orcharding. Mr. Twining evidently agrees that far with Mr. Davis, because he says it must be broken up by blasting. Where you have not got five feet you proceed to make more by blasting. You will remember, Gentlemen of the Jury, that when these lands were represented to the plaintiffs as well adapted to commercial orcharding, it was represented that they were well adapted now —not that they could be made well adapted if you break up sufficient of the hard-pan by blasting. You will remember that this blasting is somewhat costly. Mr. Davis says that it will cost from 60 cents to 75 cents a hole to blast, and that there are from 80 to 100 holes to the acre. That makes a pretty big item. [109] The representation was that the land is—not that the land can be adapted by further exertions in the way of blasting.

Mr. Twining says this soil has more of those necessary elements of potash and phosphoric acid than Mr. Davis says, some five, six, or seven times more, he finds; or, to put it the other way, Mr. Davis finds one-fifth, one-sixth, or one-seventh of what Mr. Twining finds.

Mr. Twining seems to intimate, at least, that Mr.

Davis' analysis and method is not accurate. It is a method that was used but recently. Scientific analysis is supposed to be accurate. Two and two make four just as much this year as it did 100 years ago. Scientific analysis accepted and recognized twenty-five years ago ought to be considered pretty good authority yet.

Mr. Twining says that official chemists have another one now. Mr. Davis says that the American Association of Chemists, which is not limited to the few that work for the Government, recognize the old test, as well as other tests. So it will be for you to say whether Mr. Twining is a better authority on these vital elements in the soil, or Mr. Davis, or where the truth lies between them.

Mr. Twining further says that on this particular land the hard-pan is not as hard as Mr. Davis says. He says there is only two or three inches of real hard-pan, the top of which is impervious to water, and that can easily be broken by blasting, and that below that the hard-pan is soft, and will disintegrate, and is just as good as the top soil.

Mr. Davis, however, says that his experience in Antelope was that to throw this lower hard-pan up on the surface, in four years it is still lying there in the form of rock, and it has not disintegrated, like Mr. Twining says, in his judgment, it will do.

Mr. Davis says the hard-pan is exposed in various places [110] in the Rio Linda land, and, in spite of that exposure, it has not disintegrated, at all.

There, again, you will determine which one you will give the most credit to.

Mr. Twining tells you that, in his judgment, this land, by blasting, can be made to be and will be well adapted to commercial orcharding.

So now, Gentlemen, it is for you to determine. Does the greater weight of the evidence make it appear that the land is not well adapted to commercial orcharding? If it does, the plaintiffs' case is thus far made out.

And, as to the value of the lands, whether the false representations which the plaintiffs charge were made, and which Mr. Amblad, on behalf of the defendant, denies were made. The plaintiffs' expert, Mr. Kerr, with twenty-odd years' experience in dealing with lands in and about your city, says those lands, in 1921—and you will remember that that is the test, that is when the bargain was made; it is not now, it was in 1921—were worth $50 as to one part and $75 as to another part, or an average of $62.50.

Mr. Geddes, for the defendant, says that these lands were worth $350 an acre. You heard the arguments of both sides in respect to that. Which is more reasonable, in the light of all the circumstances, as you know them? These men are expressing opinions. Whether they are both as well qualified to express an opinion is for you. The opinion of the witness is only deserving of weight in so far as you believe the witness is qualified to express it. It is for you to say in respect to these witnesses how they can vary so much that evidently both are not equally qualified, or both are not of equal knowledge, or they both are not equally hon-

est. It is for you to determine where the difficulty is between them, and which you [111] will accept, or whether you will strike a medium between them. You are not obliged to take the judgment of either of them. All the evidence is before you in respect to all the circumstances, and from your general knowledge you have a right to determine for yourselves what the value of the land was. Unless it appears by the greater weight of the evidence that the lands were worth less than $275 an acre, the plaintiffs are not entitled to recover anything. If they were worth as much as he paid for them for any purpose, he would not be damaged, and he would not have any right to recover, here. If, however, you find by the greater weight of the evidence the lands were worth less than $275 an acre in 1921, the plaintiffs' case is thus far made out, and we proceed to the next step—and that is a rule of law, which says, that the defendant, even then, is not liable unless it knew one or the other of those representations were false, if they were both made, or should have known, was neglectful in not knowing, or made them in a positive fashion, and it will not be permitted to deny knowledge at this time. Remember, Gentlemen, that at that time the defendant had had these lands for eight, or nine, or ten years. Its book says that it sold the first tract out there in 1912. It had been gathering settlers that long on these lands. It had experts in its employ. It speaks by its advertising. This book says so, Expert Horticultur*al*ist.

An expert horticultur*al*ist is one who knows, and

whether or not it is adapted to successful commercial orcharding. That is his business. It had other experts. If it did not know it, why didn't it know? If it was holding these lands out and taking people's money for them on the representation that they were adapted to successful orcharding, was it not neglectful if it did not know? Furthermore, it asserts in the book—and I suppose, Gentlemen, this famous letter is still here—it says in one letter, which [112] it makes its own, and assumes to be a letter, it is stated positively that it is proven beyond doubt the lands are well adapted to the raising of deciduous fruits commercially.

Positively, "proven beyond doubt"—there is is nothing stronger than that, Gentlemen of the Jury. As a matter of fact, nothing can be proven beyond doubt. But that is a very positive assertion in kind to impress, and, as counsel in his final argument for the defendant fairly admitted to you that that book was put out to impress those whom they wanted to buy the land. So when the defendant says it is positively proven, it is bound to know the condition of the land. If that representation is false, that the land was well adapted to commercial orcharding, the law imputes to them the knowledge, and they are liable accordingly.

If you find by the greater weight of the evidence that the defendant knew, or was negligent in not knowing, or made that positive assertion—and it did, then the plaintiffs' case is so far made out, and you proceed to the next step.

It must appear by the greater weight of the evi-

dence that the defendant intended the plaintiffs to believe them, and that the plaintiffs relied on them and were influenced by them. And counsel for the defendant, in his final argument, frankly admitted that that is what they did. That is only common sense and plain reasoning. Anyone who says they were not intending that would be assuming that you were ignorant. What does anyone put out an advertisement for except to persuade people to believe the statements made therein, and to persuade them to buy? So that part of the plaintiffs' case is made out.

Then there is another rule of law necessary in plaintiffs' case, and that is, that it is necessary that it appears by the greater weight of the evidence before you that plaintiffs did believe [113] them and rely upon them, and in whole or in part were influenced and induced to buy the lands because of them. Now, again, you apply your common sense to that proposition. Why should he not believe the representation in the book, and the representation of Amblad, if Amblad made representations? The book is enough, so far as the adaptability of the land to commercial orcharding is concerned. They were down in Minnesota. They did not know anything about California, California fruit lands, or fruits, or how to raise them. He was a worker in the Ford factory. He says he believed them. That sounds reasonable and natural. The wife says she believed them, also. He says that believing it, it influenced him. He believed the representation the land was well adapted to fruit farming, commercial orchard-

ing, and believes it was worth $275 and more an acre, and going up. The book says it is going up to $3,000 an acre when the orchard is in bearing. On the strength of that he says he bought it. If that appears to be reasonable, and proved to you by the greater weight of the evidence, their case is made out. The law says that on the representations made by one to induce another to buy, the inference can be drawn that they did induce him to buy, that he was influenced by it. On the other hand, if you do not believe that those representations influenced the plaintiffs to buy, if you do not, by the greater weight of the evidence, find that they did influence them to buy, then, of course, the plaintiff has no case, because, no matter what false representations are made, if they do not influence them, if they are no inducement to make the bargain, they have not damaged them. He made the purchase for other reasons. They say they bought on the strength of those representations. Thus, if you find them proven, then the next question is, were the plaintiffs damaged? That comes right back to the question of the value of the land. [114]

If the land was worth as much as the plaintiffs paid for it they did not lose anything, no matter what the representations were. They got value received. It is only when they did not get value received that, in spite of any fraud, they have the right to recover from the party who sold it to them. If you find that it is proven by the greater weight of the evidence that the land was worth less than $275 an acre when the plaintiffs bought it in 1921,

you give the plaintiffs, as their damage, the difference between what you find the lands worth at the time and what they paid for them. By way of illustration, and by way of illustration only, if you find that they were worth $100 an acre, you would give the plaintiffs $175 an acre. If you find that the lands were worth $150 an acre, you would give the plaintiffs $125 an acre. If you find that the lands were worth $200 an acre, you would give the plaintiffs $75 an acre. In other words, you are just to make them whole, if you find that they got less than what they paid for.

But that is not quite all the case, Gentlemen of the Jury. It appears that the plaintiffs purchased this property away back in 1921, in November of 1921, They came out to see the place in October, 1922. The law is that one who has been defrauded into buying land, as the plaintiffs say they were, must bring their suit within three years after they discover the fact that they have been defrauded, or within three years after they discovered facts which ought, in the judgment of the jury, to have put them on notice, and which, had they pursued the inquiry with diligence, would have made them acquainted with the proof that they had been defrauded. That will be for your determination. They came on the land in 1922. The plaintiff had found out before he came that there was hard-pan on the land. But, of course, that is not alone the defendant's contention, even to-day, the defendant insists that that hard-pan is [115] no detriment to the land so far as fruit growing is concerned. You can see that it is

a matter not only of disputed opinion, but you must settle the disputations between experts.

The plaintiff testified that he went to see Amblad about what he had heard. He did not know what hard-pan was. He had farmed to some extent, back in Wisconsin, on a general farm. So he told Mr. Amblad about it, and Mr. Amblad said to him, "Yes, there is hard-pan there, but it is not detrimental to the raising of fruit." He says he believed Amblad. Amblad was the same party that made the representations to him at the beginning of the bargaining, was a representative of the company, and the plaintiff was still confident that they were dealing fairly with him.

There is a presumption that all transactions are fair and regular; but that presumption, however, may be overcome by the circumstances disclosed in the evidence before you. It is also true that fraud is never presumed, but you may infer it from the evidence and the circumstances before you. He said—inferentially, at least, he had confidence in the truth of this representation.

So he came out here in October, 1922, and he did some work on the land, in the course of which he struck the hard-pan in sinking holes. Finding it there, he then said that it was hard on the surface, and a little softer below. He developed it in his well pit, and found it eighteen feet deep. Then what did he do? He took the advice of the book. The book says, "Consult our expert horticultur*al*ist, Mr. McNaughton." The plaintiff says he did go to see Mr. McNaughton, and asked Mr. McNaughton

if that was still all right for raising fruit on that land. He says that Mr. McNaughton said, "Yes, that is volcanic ash; it is a good thing it is there; trees need that; if you blast it the roots will penetrate, and water and air will slack that hard-pan." [116]

Again he says he believed it. When you ask yourselves whether he did believe it, ask yourselves why he shouldn't believe it? He still had confidence in the fairness of the company. Mr. McNaughton was the company's trusted agent, to whom the settlers were instructed to go. No one would intimate, perhaps, that that was to keep him from getting information elsewhere, but still that is a circumstance which might well appear.

So he goes to the company's expert, and the company's expert quiets his suspicions, if he had any, gives him reassurance that it was all true, that this hard-pan was valuable, and necessary to contribute to the growth and the productiveness of the trees. He says he believed it. He made no further inquiry, he says. You ask yourselves whether a person in his position ought to listen to every rumor that might pass around, if there was any. He says he heard none. He heard nothing derogatory to the land until after the time when his suit would be in time, February, 1925. He says, though, that in 1925, having been living on the land, but always working in town, himself—you have a right to bear that in mind, Gentlemen—he says that in 1925 he proceeded to plant trees. He planted some also in 1926—no, in 1925. The first year he says

they did well. That carried him over the time, Gentlemen of the Jury, when his suit would be in time. He says two or three died the next year, several the next year, and several more the next year, and now they don't look so good. He says that until that time he had no reason to believe the soil was too shallow, and would not grow deciduous fruit commercially. Deciduous fruits are those that lose their leaves every year. He says he did not find out that these representations made to him were false until after February, 1925. His wife says the same thing. If you find by the greater weight of the evidence that that is made out, his suit is in time, [117] and he is entitled to recover at your hands. He was only required to make inquiry when his suspicions were aroused; and if the company's representative allayed his suspicions, and there is no denial that Mr. McNaughton said that—McNaughton has not been called to deny it; so, as I say, if that was a suspicion, and if the company allayed his suspicion, that excuses him for the time being from any further diligence on his part to attempt to prove it false, unless you believe that a prudent man would not have given it any credence whatever. Remember that a person who thus buys, where it seems to be a matter of expert knowledge, remember that the defendant is still maintaining that the land is adapted to commercial orcharding, and this expert of the defendant, also. The party buying the land does not have to go out and hire experts to see if he can prove that that which

was represented to him was false, and on the strength of which he bought the land.

So, Gentlemen of the Jury, if you believe these elements of the plaintiffs' case proven by the evidence before you by the greater weight of it, they are entitled to recover, and you will find for them accordingly.

There was one more item of damage. The land represented to be adapted to commercial orcharding, growing deciduous fruit-trees, the plaintiff tried it out. He says he spent $45 for planting the trees, and $40 in cultivating them before he discovered it was no use, that the trees did not flourish. He would be entitled to whatever he thus reasonably expended. The rule is that if one party sells to another something, and represents it to be adapted to a special use, or a special purpose, and if that representation is false, as I have heretofore explained it to you, whatever money is reasonably spent in attempting to put it to that use may be recovered.

When you retire to your jury-room, Gentlemen, you will [118] select one of your number foreman and proceed to arrive at a verdict.

Exceptions for plaintiffs?

Mr. McCUTCHEN.—None.

The COURT.—For defendant?

Mr. BUTLER.—We except to the instruction upon the subject of representation claimed to have been made to plaintiff by defendant, both as to the growing of fruit, and the question of value.

An exception to the instruction on the question

of false representation and knowledge of the falsity on the part of the defendant.

We save an exception to the Court's instruction upon the definition of a commercial orchard.

We also except to the instruction regarding the question of belief on the part of the plaintiff, and reliance thereon.

Also to the instruction regarding the present adaptability of the soil.

Also an exception to the instruction concerning the question of the date of discovery under the statute of limitations.

We also except to the failure of the Court to give defendant's proposed exception No. 1, upon the matter of the statute of limitations.

We also except to the failure of the Court to give defendant's proposed instruction No. 2, concerning the effect of the discovery by plaintiff of the falsity of material representations.

We also except to the failure of the Court to give defendant's proposed instruction No. 4, concerning distinctions between representations and matters of opinion.

We also except to the failure of the Court to give defendant's proposed instruction No. 5, concerning the effect of plaintiffs having been able, by reasonable diligence, to discover [119] the alleged falsity of representations as to value.

We also except to the instruction that the defendant, by its booklet, represented plaintiffs' land to be well adapted to the growing of deciduous fruit commercially. And also to the instruction that the

statements in the defendant's literature apply to the land purchased by plaintiffs.

The COURT.—Gentlemen of the Jury, it is late, and I will be leaving the building. You will proceed to deliberate and arrive at a verdict. When you have thus arrived at a verdict, your foreman will sign it, seal it, and put it in an envelope, and keep it in his pocket, and you may disperse to your homes, returning to court to-morrow morning at ten o'clock to report your verdict. You will, remember, of course, to keep secret whatever conclusion you have arrived at. And remember, Gentlemen, you do not separate until you have arrived at a verdict.

(Thereupon the jury retired, and subsequently returned into court and rendered a verdict in favor of the plaintiffs and against the defendant, and assessed the damages in the sum of $2,000.00.)

Defendant proposes the foregoing as its bill of exceptions on appeal from the judgment in said cause, and prays that it be allowed and settled as such.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant.

Dated: November 27th, 1928. [120]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions do not appear in the record of said cause, I, ————, Judge of the District Court, upon the stipulation of the parties, have settled and signed the said bill, and have ordered that the same with amendments accepted and allowed, be made a part of the record of the said cause, this 20 day of Dec., 1928.

BOURQUIN,
Judge.

[Endorsed]: Filed Dec. 27, 1928. [121]

[Title of Court and Cause.]

PROPOSED AMENDMENTS TO PROPOSED BILL OF EXCEPTIONS.

Come now the plaintiffs and propose that defendant's proposed bill of exceptions be amended as follows:

1. Page 48, line 22, in place of "a quantitative" insert "an authoritative."

2. Page 52, line 20, insert the following: "The cause was thereupon argued to the jury. During the course of the argument counsel for the defendant admitted that defendant by its literature had represented to plaintiffs that the piece of land which they purchased was proven beyond a doubt

to be well adapted to the raising of fruit commercially and that this representation had been made for the purpose of inducing plaintiffs to buy the land."

(Allowed. See charge unquestioned.—BOURQUIN, J.)

3. Page 67, line 15, after "Kerr" insert "with" and after "odd" insert "years."

4. Page 69, line 1, after "stated" insert "positively" and strike out the same word in line 2, page 69.

5. Page 69, line 4, take the word "positively" out of quotation marks and insert after it a comma.

6. Page 73, line 5, correct "entrusted" to read "instructed" and "indicate" to read "intimate." [122]

Dated: December 3, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

Due service and receipt of a copy of the within proposed amendments to proposed bill of exceptions is hereby admitted this 3d day of December, 1928.

EDWARD P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 5, 1928. [123]

[Title of Court and Cause.]

NOTICE OF REJECTION OF PROPOSED AMENDMENT TO PROPOSED BILL OF EXCEPTIONS.

To the Above-named Plaintiffs, and to Messrs. Ralph H. Lewis and George E. McCutchen, Attorneys for Said Plaintiffs:

PLEASE TAKE NOTICE: That defendant does not accept your proposed amendment No. 2 to its proposed bill of exceptions.

That proposed amendments, numbers 1, 3, 4, 5 and 6 are accepted.

Dated: December 6, 1928.

ARTHUR C. HUSTON,
E. P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 17th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 18, 1928. [124]

[Title of Court and Cause.]

STIPULATION WAIVING NOTICE OF PRESENTATION OF PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that defendant's proposed bill of exceptions in the above-entitled cause, with plaintiffs' proposed amendments thereto, and defendant's notice of rejection thereof, except as to the proposed amendments which have been accepted, may be presented to Hon. George M. Bourquin, who presided at the trial of the above cause, for settlement, without further notice or argument.

Dated: December 8th, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.
ARTHUR C. HUSTON,
E. P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Dec. 18, 1928. [125]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND COST BOND.

On the filing by defendant of a petition for appeal, with assignment of errors, and on motion of

defendant, by its attorneys, IT IS HEREBY ORDERED:

That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered herein be, and the same is hereby, allowed.

AND IT IS FURTHER ORDERED that upon the giving by defendant of a good and sufficient bond, in the sum of Four Thousand ($4,000.00) Dollars, and conditioned as required by law, and the rules of this court, all further proceedings in the said court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals or by the Supreme Court of the United States upon a petition for writ of certiorari.

IT IS FURTHER ORDERED that the amount of cost bond on said appeal be, and it hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned as required by law and the rules of this court.

The supersedeas and cost bond may be embraced in one document.

A. F. ST. SURE,
United States District Judge.

Dated: December 5th, 1928. [126]

Service hereof is hereby admitted and receipt of copy acknowledged this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 7, 1928. [127]

[Title of Court and Cause.]

SUPERSEDEAS BOND AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Sacramento Suburban Fruit Lands Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, and authorized under the laws of the State of California and the above-entitled District, to act as sole surety on undertakings of this character, as surety, are held and firmly bound unto J. H. Hanson and Jennie B. Hanson, the above-entitled plaintiffs, in the full and just sum of Four Thousand Two Hundred Fifty ($4,250) Dollars, to be paid to the said J. H. Hanson and Jennie B. Hanson, their attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of December, 1928.

WHEREAS, lately at a District Court of the United States [128] for the Northern District of California, Northern Division, Second Division thereof, in a suit pending in said court between said J. H. Hanson and Jennie B. Hanson, as plaintiffs, and Sacramento Suburban Fruit Lands Com-

pany, as defendant, a judgment was rendered against the said Sacramento Suburban Fruit Lands Company in the sum of Two Thousand ($2,000.00) Dollars, and in the further sum of costs amounting to $33.10, and the defendant having been allowed an appeal from the judgment to the United States Circuit Court of Appeals for the Ninth Circuit; and the Court having made an order for supersedeas staying all proceedings in the District Court pending final determination of said appeal, provided the defendant give a bond in the sum of Four Thousand ($4,000.00) Dollars, conditioned according to law; and the Court having fixed the amount of cost bond on said appeal in the sum of Two Hundred Fifty ($250.00) Dollars; and the Court having ordered that the supersedeas bond and bond for costs might be combined and embraced in one document,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Sacramento Suburban Fruit Lands Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

AND IT IS FURTHER EXPRESSLY AGREED by said surety that in case of a breach of any condition hereof, the above-entitled court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the action in which this bond is given to ascertain the amount which said surety is bound to pay on account of such breach,

and to render judgment therefor against it and to award execution therefor. [129]

IN WITNESS WHEREOF, said principal and surety have executed this undertaking, attesting such execution by their respective seals, all on this, the 8th day of December, 1928.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation.

[Seal] By A. E. WEST.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation.

[Seal] By J. W. S. BUTLER, Attorney-in-fact.

State of California,
County of Sacramento,—ss.

On this 8th day of December, 1928, before me, a notary public in and for the county of Sacramento, State of California, personally appeared J. W. S. Butler, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Standard Accident Insurance Company, and he acknowledged to me that he subscribed the name of Standard Accident Insurance Company thereto, as principal, and his own name as the attorney-in-fact.

[Seal] GERALD M. DESMOND,
Notary Public in and for the County of Sacramento, State of California.

Form of bond and sufficiency of sureties approved.

Dated: Dec. 11, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 12, 1928. [130]

[Title of Court and Cause.]

ORDER TRANSMITTING EXHIBITS.

It appearing to the Court that the exhibits of plaintiffs and defendant, except the perishable exhibits and samples of hard-pan, should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit in their original form,—

IT IS HEREBY ORDERED that said exhibits, except the perishable exhibits and samples of hard-pan, be transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit in original form, with the bill of exceptions, and need not be printed as part of the record herein.

Dated: January 14th, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 14, 1929. [131]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare a record on appeal contain-

ing true copies of the following papers in the above-entitled action:

1. Order removing said cause from the Superior Court of the State of California to the District Court of the United States.
2. Complaint.
3. Demurrer to complaint.
4. Order overruling demurrer.
5. Answer.
6. Minutes of trial.
7. Verdict of the jury.
8. Judgment.
9. Petition for appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Proposed amendments to bill of exceptions.
13. Notice of rejection of proposed amendments.
14. Stipulation waiving notice of presentation of bill of exceptions.
15. Order allowing appeal.
16. Citation.
17. Supersedeas and cost bond.
18. Order transmitting exhibits.
19. Praecipe for transcript.
20. Amended complaint.
21. Demurrer to amended complaint.
22. Order overruling demurrer to amended complaint.

J. W. S. BUTLER,
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant. [132]

Service hereof is hereby admitted and receipt of copy acknowledged this 22 day of January, 1929.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 22, 1929. [133]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 133 pages, numbered from 1 to 133, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of J. H. Hanson et al. vs. Sacramento Suburban Fruit Lands Co., No. 475 —Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Fifty-five and 25/100 ($55.25) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said District Court, this 1st day of Feb., A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [134]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to J. H. Hanson and Jennie B. Hanson, Appellees, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Sacramento Suburban Fruit Lands Company, a corporation, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated: This 5th day of December, A. D. 1928.

A. F. ST. SURE,
United States District Judge. [135]

Due service of within citation is hereby admitted this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Appellees.

Citation on Appeal. Filed Dec. 7, 1928.

[Endorsed]: No. 5705. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Suburban Fruit Lands Company, a Corporation, Appellant, vs. J. H. Hanson and Jennie B. Hanson, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed February 2, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.